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# Conceiving Non-Marital Fathers' Rights: An Inquiry into the Constitutionality of West Virginia's Adoption Statute

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# CONCEIVING NONMARITAL FATHERS' RIGHTS: AN INQUIRY INTO THE CONSTITUTIONALITY OF WEST VIRGINIA'S ADOPTION STATUTE

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*Lisa Kelly\**

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## I. INTRODUCTION

When do the rights of nonmarital fathers to their children quicken? Is it only upon the father's establishment of a substantial economic and emotional relationship with his child? Do such fathers' interests gel only after the ink has dried on an order or affidavit in which paternity is established or acknowledged? Do their fundamental rights lie inchoate in the beating hearts of the newborn or gestating child? How should the law regard the role of the nonmarital father in the adoption context? Should there be one standard for all or two—one for fathers of infants and another for fathers of older children? There are a few of the questions with which this article struggles in attempting to unravel whether West Virginia's current treatment of nonmarital fathers in the adoption context is constitutional.

In Part II of this article, I will demonstrate the West Virginia legislature's ambivalence by exposing the contradictory provisions within the adoption statute itself. Under one statutory section, only certain types of nonmarital fathers are entitled to consent while under another, all biological parents are given the right to be approached for consent. Under one section, only certain types of nonmarital fathers are entitled to notice while under another, all unknown fathers, once identified, are entitled to notice. It is hoped that this section, at the very least, will persuade the legislature to clarify some of these ambiguities in order to achieve greater certainty. Adoption practice must have certainty because the lives of children, who are at the heart of this legal enterprise, demand at least that much.

In Part III of this article, I will review the ambivalent judicial gaze that has been cast upon the constitutional rights of nonmarital fathers. Both the United States Supreme Court and the West Virginia Supreme Court of Appeals have issued opinions affecting the rights of nonmarital fathers in the adoption context. The United States cases are decades older; the Court has since changed; and a recent decision may portend a different direction. The West Virginia cases are more recent and go a little further than the United States Supreme Court in extending fundamental rights to nonmarital fathers. By reviewing the decisions of both Courts, I hope to divine some consistent constitutional theory and then apply it to the multiple interpretations of our statute.

In Part IV, I will offer a variety of solutions to resolve the contradictions within the West Virginia statute and insure the statute's constitutionality against different types of challenges. None of these solutions are problem-free and so both

the advantages and disadvantages associated with them will be discussed.

Finally, the goal of this article is not to critique the developing constitutional standards, simply to discern and apply them.<sup>1</sup>

## II. THE OPERATION OF THE WEST VIRGINIA ADOPTION STATUTE: WHAT A TANGLED WEB WE WEAVE

In virtually every state, certain persons are entitled to notice of the adoption while others are granted the power to veto the adoption by withholding their consent. Notice provides the individual with an opportunity to have his or her voice heard. Typically, the ultimate issue in any adoption is whether it will serve the child's best interest. Those who weigh in after receiving notice are entitled to have their evidence heard on this ultimate issue. Consent, on the other hand, is a prerequisite to the adoption going forward at all. Consent can only be side-stepped if the parent's rights are terminated, after notice and hearing. Sometimes this consent power is referred to as a "veto power" over the adoption because being in this category enables the fit parent to stop the adoption. Those vested with the power to consent, therefore, typically are those whom the state recognizes as having fundamental parental rights.

In West Virginia, acquiring a complete understanding of the nonmarital father's place in the adoption proceeding requires more than a simple statement of who must consent or receive notice. The nonmarital father's opportunities to participate in the adoption proceeding are intertwined with West Virginia's paternity statute<sup>2</sup> as well as with the timing of other provisions in the adoption statute itself. Further complicating matters is the fact that the adoption statute contradicts itself on the central question of who must provide consent before an adoption can proceed.<sup>3</sup> The following sections describe the sometimes contradictory interworkings of all of the relevant statutory provisions in order to define completely the current contours of the nonmarital father's rights in the adoption context.

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<sup>1</sup> There is much to be said about the difficulties as well as virtues of rights discourse in the adoption context. It is true that in all of the "rights talk" that surrounds parents, the interests of children in a community of caregivers may get lost. See Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 CARDOZO L. REV. 1747, 1841-1844 (1993); MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 47-48 (1991); Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family has Failed*, 70 VA. L. REV. 879, 881-83 (1984). However, after all of the debate over whether we ought to talk of interests and needs, instead of rights, two realities remain: 1) the majority of parents do feel that they have a deep stake in their children that is unique to them as parents; and 2) the courts and litigants have and likely will continue, at least for the near future, to speak in terms of parental rights. See *Troxel v. Granville*, 530 U.S. 57, 75 (2001) (holding that Washington state's nonparental visitation statute—which allowed any person to petition for visitation and state courts to grant visitation when it is in the child's best interest—violated parents' due process rights to rear their children).

<sup>2</sup> See W. VA. CODE §§ 48-24-101 to -106 (2001). The West Virginia Legislature recently recodified Chapters 48 and 48A of the West Virginia Code by combining the two chapters into a new Chapter 48. Most of those changes were not substantive and were merely organizational. This article will cite to the 2001 recodification, but reforms, for purposes of this article, happened in 1997.

<sup>3</sup> See W. VA. CODE §§ 48-22-301, 48-22-501 (2001).

A. *Consent to Adopt in West Virginia*

In West Virginia, all birth mothers have the right to be approached for consent, as do all marital fathers.<sup>4</sup> This much is certain. Unfortunately, beyond these two statements all certainty evaporates.

The treatment of nonmarital fathers is rife with confusion because the adoption statute contradicts itself in a very big way. On the one hand, when listing who is entitled to be approached for consent, section 301 explicitly lists only determined nonmarital fathers as entitled to this privilege.<sup>5</sup> On the other, section 501 of the statute declares that the hearing on the adoption petition may only be had after “the rights of all *nonconsenting birth parents* have otherwise been terminated.”<sup>6</sup> “Birth parents” are defined much more broadly than “determined fathers.” “Birth parents” are “the biological father and the biological mother of the child.”<sup>7</sup>

The reason for this terrible ambiguity is that the 1997 reforms of the adoption statute were initiated by the West Virginia Law Institute (hereinafter “the Institute”),<sup>8</sup> but the legislature failed to mesh the changes it had made to the Institute’s draft with all of the language in the final bill. The Institute’s draft gave all biological parents the right to be approached for consent,<sup>9</sup> and the Institute’s draft was the working document from which the legislative committees made changes. The legislature changed the consent provision but failed to alter the language buried in section 501, which contradicted it.

It is clear to this author what the legislature intended because of my lengthy involvement with the process that produced the reforms in the current statute. The intent of the legislature was to reject the Institute’s recommendation

<sup>4</sup> West Virginia Code section 48-22-301 states:

- (a) Subject to the limitations hereinafter set forth, consent to or relinquishment for adoption of a minor child is required of:
- (1) The parents or surviving parent, whether adult or infant, of a marital child;
  - (2) The outsider father of a marital child who has been adjudicated to be the father of the child or who has filed a paternity action which is pending at the time of the filing of the petition for adoption;
  - (3) The birth mother, whether adult or infant, of a nonmarital child; and
  - (4) The determined father.

W. VA. CODE § 48-22-301 (2001).

<sup>5</sup> *See id.*

<sup>6</sup> W. VA. CODE § 48-22-501 (2001) (emphasis added).

<sup>7</sup> W. VA. CODE § 48-22-107 (2001).

<sup>8</sup> The West Virginia Law Institute is a statutorily created body that serves “as an official law revision and law reform agency of the state of West Virginia . . . located at the West Virginia University college of law.” W. VA. CODE § 4-12-1 (1999).

<sup>9</sup> *See* Lisa Kelly, *The West Virginia Adoption Statute: A History of a Work in Progress*, 102 W. VA. L. REV. 1, 15-16 (1999).

that all biological parents be approached for consent and to maintain, as it long had been, that when it came to nonmarital fathers, only determined fathers need consent.<sup>10</sup> However, no official legislative history exists explaining how or why changes were made in 1997, only this author's account in a recent law review article.<sup>11</sup>

A naked reading of the statute reveals a contradiction which could be read and argued either way. One could argue that, given that section 301 is actually entitled "Persons whose consent or relinquishment is required," its provisions should govern.<sup>12</sup> However, it could also be argued that section 501 should control because it is later in the statute and because it actually reflects a change rendered by the 1997 reform.<sup>13</sup> Finally, the difficulty and sometimes transparency of choosing a rule of construction to resolve a statutory contradiction was reviewed in *Virginia Electric and Power Co. v. Public Service Commission of West Virginia*,<sup>14</sup> in which Justice Neely determined that given the competing rules of statutory construction involved, the most honest way to resolve the conflict is to look to modern concepts of the affected area of the law. If the construing court sought to resolve the conflict inherent in this statute, then, it would look to modern concepts of adoption law to determine whether only determined fathers or all biological fathers would be required to consent. Therefore, the substance of the question could not be avoided under a formalistic rule of statutory construction.

If section 501 does prevail, then it is clear that all biological parents, whether male or female, married or not married, must be approached for consent or have their rights terminated. If, on the other hand, section 301 applies, then only determined fathers are entitled to give or withhold consent. The remainder of this sub-part will address the contours of nonmarital father's rights assuming that only determined fathers are entitled to consent.

Determined fathers are: 1) those who have been formally adjudicated to be the child's father before the adoption is final; 2) those who have established their

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<sup>10</sup> See W. VA. CODE § 48-22-301 (2001).

<sup>11</sup> See Kelly, *supra* note 9, at 40-58.

<sup>12</sup> The best measure of legislative intent is the language used. See *Spencer v. Yerace*, 180 S.E.2d 868, 871 (W. Va. 1971). In construing intent, one can look to the title of the statute. See *City of Huntington v. State Water Comm'n*, 64 S.E.2d 225, 228 (W. Va. 1951). However, one mustn't confuse the title with chapter, article, and section headings which cannot be used to ascertain intent. See W. VA. CODE § 2-2-12 (1999).

<sup>13</sup> See *DHHR v. West Virginia Public Employee Retirement Sys.*, 393 S.E. 2d 677, 680 (W. Va. 1990) (citing *Pinson v. Varney*, 96 S.E.2d 72, 74 (W. Va. 1956) ("If . . . several statutory provisions cannot be harmonized, controlling effect must be given to the last enactment of the Legislature.")).

If section 301 is found to be unconstitutional, the argument in favor of section 501 would be strengthened by the general rule of statutory construction that presumes that the legislature considered the constitution in its enactment and did not intend to violate it. See *Willis v. O'Brien*, 153 S.E.2d 178, 182 (W. Va. 1967).

How the differences in construction might be resolved might depend upon the construing court's idea of justice given the rule that when one interpretation does justice and another interpretation does not, the court should choose the one which does justice. See *Rider v. Braxton County Ct.*, 82 S.E. 1083, 1086 (W. Va. 1914).

<sup>14</sup> 284 S.E. 2d 322, 325-326 (W. Va. 1978).

paternity informally by an affidavit also signed by the mother; 3) those who have paternity actions pending at the time of the filing of the adoption petition; or 4) those who have fathered children born or conceived during the marriage of the mother to someone else but only if a paternity action has been initiated or adjudicated prior to the filing of the adoption petition.<sup>15</sup> This last category involves men whom the statute refers to as “outside fathers;” an “outsider father” is defined as the “biological father of a child born to or conceived by the mother while she is married to another man who is not the biological father of the child.”<sup>16</sup> In essence, under section 301, the non-marital father’s entitlement to consent turns on whether he has filed a paternity action prior to the filing of the adoption petition or whether he has established his paternity prior to the final adoption hearing.<sup>17</sup> All others are left out of the right to consent, without regard to whether they have established a relationship with the child in question.

Furthermore, the only step the father may take independently to establish his interest in the child with certainty is the filing of a paternity action before the adoption petition is filed. The paternity affidavit requires the mother’s assent and signature.<sup>18</sup> Even the ultimate adjudication of paternity can be affected by the mother’s behavior. She can deny his paternity allegations; she can fail to appear for blood tests,<sup>19</sup> should they be ordered; and, she can move for continuances. Her

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<sup>15</sup> Both “determined fathers” and “outsider fathers” referenced in West Virginia Code section 48-22-301(3)(a) refer to subsets of non-marital fathers. *See* W. VA. CODE § 48-22-301 (2001).

A number of statutory sections must be read together to define the contours of category of non-marital fathers entitled to consent. Determined father is defined by West Virginia Code section 48-22-109 as:

[b]efore adoption, a person: (1) In whom paternity has been established pursuant to the provisions of article 24-101 et seq. [§ 48-24-101 et seq.] and section 16-5-12, whether by adjudication or acknowledgment as set forth therein; or (2) who has been otherwise judicially determined to be the biological father of the child entitled to parental rights; or (3) who has asserted his paternity of the child in an action . . . that is pending at the time of the filing of the adoption petition.

W. VA. CODE § 48-22-109 (2001).

Under West Virginia Code section 48-24-101 through 48-24-103, paternity may be established by a proceeding brought before the court for adjudication or by the acknowledgment of the natural father using an affidavit that meets the specific requirements of section 48-24-106, which requires that the mother of the child also acknowledge the man as the child’s father. *See* W. VA. CODE § 48-24-101 –103 (2001).

<sup>16</sup> W. VA. CODE § 48-22-113 (2001).

<sup>17</sup> *See* W. VA. CODE § 48-22-109 (2001).

<sup>18</sup> West Virginia Code section 48-24-106 permits the establishment of paternity by acknowledgment executed in compliance with § 16-5-23, which requires:

A written notarized acknowledgment *of both the man and woman* that the man is the father of the named child legally establishes the man as the father of the child for all purposes and child support may be established pursuant to provisions of chapter forty-eight [§§ 48-1-101 et seq.] of this Code.

W. VA. CODE 16-5-12(i) (2001) (Emphasis added).

<sup>19</sup> Under section 48-24-103, blood or tissue tests may be ordered to supply evidence of paternity. If the tests return an undisputed probability of paternity is more than 98%, then paternity is conclusively established. *See* W. VA. CODE § 48-24-103 (2001).

conduct can delay a decision in an adoption situation, where time is of the essence.

A close reading of the statute reveals that if the father is relying upon his actual paternity establishment, whether informal or formal, to entitle him to the right to consent, paternity must be established prior to the adoption itself.<sup>20</sup> Although the statute is not explicit as to its intent in this regard, it is fair to assume that, by "adoption," the legislature intended a reference, most likely, to the final adoption hearing at which time the court is required to pass on whether any persons retain parental rights in the child to be adopted.<sup>21</sup>

However, if the father is relying upon his mere filing of a paternity action to entitle him to consent, he must be sure to file it prior to the filing of the adoption petition.<sup>22</sup> Of course, there may be overlap if the father opts for formal adjudication, i.e., the father who files his paternity action prior to the filing of the adoption petition may have his paternity adjudicated while the adoption petition is still pending but before the final adoption hearing. It is also possible for a father who has not filed a formal paternity action prior to the filing of the adoption petition to be entitled to consent if he can have his paternity settled by an affidavit signed by both him and the mother or if he can have his paternity action resolved prior to the final adoption hearing.

Put another way, in order to place himself in the position of one entitled to veto power, the non-marital father may do one of two things: 1) beat the adoptive parent(s) to the courthouse to file his paternity complaint; or 2) if the adoptive parents win the race to the courthouse and file their adoption petition first, he may enlist the support of the birth mother to sign his paternity affidavit or rush through a post-adoption-petition paternity action before the adoption is finally adjudicated.

The time elapsed between the filing of the adoption petition and the final adjudication of the adoption may vary. Nothing in the statute prescribes one specific time that has to expire between the start and finish of an adoption action. Other time periods set forth in the statute may, however, affect both when the adoption petition is filed and when the final adoption hearing may take place. The adoption petition may be filed any time after all consents that can be obtained are executed.<sup>23</sup> A consent cannot be executed until seventy-two hours after the birth of the child to be adopted.<sup>24</sup> A final hearing on the adoption can be had no sooner than forty-five days after the filing of the petition.<sup>25</sup> In addition, the child must have lived with the adoptive parents for a period of at least six months prior to the final hearing.<sup>26</sup>

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<sup>20</sup> See W. VA. CODE § 48-22-109 (2001).

<sup>21</sup> See W. VA. CODE § 48-22-701(a)(1) (2001).

<sup>22</sup> See W. VA. CODE § 48-22-109 (2001).

<sup>23</sup> See W. VA. CODE § 48-22-501 (2001). The child must also have been born and his or her placement determined. See *id.*

<sup>24</sup> See W. VA. CODE § 48-22-302(a) (2001).

<sup>25</sup> See W. VA. CODE § 48-22-501 (2001).

<sup>26</sup> See *id.*; see also W. VA. CODE § 48-22-701(a) (2001).



Therefore, the shortest time that may elapse from the birth of the child to the filing of an adoption petition may be seventy-two hours. If the adoption petition is filed that quickly, however, in the case of a newborn adoption, it will be pending for at least six months before the final hearing. If, on the other hand, the adoptive parents choose to file later rather than sooner, the adoption petition may be pending for only 45 days, assuming the child has lived with them for six months at the close of that period. Under the latter scenario, the non-marital father will have four and one-half months to file his paternity action.

Of course, nothing in the statute compels the filling of an adoption petition at any given time. The adoptive parents could simply neglect to file the petition after the mother's consent and placement of the child. However, to rely on this consent alone would be a risky strategy because although the adoptive parents are sitting on the mother's consent, the father could be acquiring rights that might lead to his vetoing of the adoption.

If we assume that the adoptive parents file their adoption petition immediately after the expiration of the seventy-two hour period and the execution of the mother's consent, we still need to look at the paternity statute to determine the size of the window that the nonmarital father has to establish himself as one entitled to consent. The paternity statute contemplates that a paternity action may not be filed until after a child is actually born. For example, when the statute gives a father standing to bring a paternity action, that standing is found to reside in "a man who he believes is the father of a *child born out of wedlock*."<sup>27</sup> Again, the provision that describes how a paternity complaint must be instituted refers to "a civil action to establish the paternity of a *child*."<sup>28</sup> Venue also lies "in the circuit court of the county where the *child* resides."<sup>29</sup> It would appear that the statute assumes that, without a child, there can be no paternity action.

Adoptions arise in a number of different contexts and when children are of varying ages. However, again, if we assume the case of a newborn adoption with the birth mother's consent executed immediately after the passage of the 72 hours and the adoptive parents' filing their petition immediately upon receiving her consent, a nonmarital father's only certain opportunity to act on his own to qualify himself as one entitled to consent is within the first three days after the child's birth. Under the paternity statute, he has to wait until the child is born to file his paternity action; meanwhile, under the adoption statute, the adoptive parents theoretically can file the petition seventy-two hours after the child is born if they have secured the birth mother's consent. If the father has not filed a paternity action at the time the adoption petition is filed, the adoptive parents need not approach him for his consent.

However, the child must reside with the adoptive parents for six months prior to the final adoption hearing. Therefore, if the mother refuses to sign the paternity affidavit on the father's behalf, the father can file a paternity action after the filing of the adoption petition, but, in order to be entitled to consent, he must

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<sup>27</sup> W. VA. CODE § 48-24-101(e)(8) (2001) (emphasis added).

<sup>28</sup> W. VA. CODE § 48-24-101 (a) (2001) (emphasis added).

<sup>29</sup> *Id.* (emphasis added).

have the paternity adjudication resolved before that final adoption hearing.

Assuming that the father learns of the birth immediately, it is much safer for the father to file his action within the first seventy-two hours. Of course, this may be a big assumption. Even if the father knows the baby's due date,<sup>30</sup> babies don't always arrive on time. They may be early; they may be late.<sup>31</sup> For nonmarital fathers aware of the intricacies of the adoption statute, this provision could result in encouraging them to stalk pregnant birth mothers so that they do not lose track of where and when the mother gives birth.

If the father does not learn of the birth in enough time to file his action prior to the filing of the adoption petition, then he is dependent on either the birth mother's good graces to assent to the affidavit or not contest the paternity action. Otherwise, he must attempt to accomplish the following within, at the most, six months' time: 1) file a paternity action; 2) serve it upon the birth mother; 3) perhaps move for paternity testing if the birth mother denies paternity in her answer;<sup>32</sup> 4) docket<sup>33</sup> and participate in a hearing on the motion for paternity testing before the family law master; 5) have the paternity testing performed and results returned;<sup>34</sup> 6) docket and participate in a final hearing on the issue of paternity; 7) draft the final recommended order<sup>35</sup> for the family law master's review and approval; 8) wait ten days after the family law master's signature for any petitions for review that might be filed by the birth mother;<sup>36</sup> and 9) wait for the circuit judge to decide whether to sign the recommended order establishing paternity.

Further complicating the intersection of the paternity statute and the adoption statute is the court system in West Virginia. Under the current system, adoptions are heard by circuit court judges<sup>37</sup> while paternity actions are referred to

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<sup>30</sup> Examples of fathers guessing wrong about their biological children's birth dates can be found in *B.G. v. H.S.*, 509 N.E.2d 214, 215 (Ct. App. Ind. 1987) (noting that the father stated in his paternity petition that the child was born on or about August 30, 1984 when in fact the baby was born on October 4, 1984); *Adoption of Kelsey S.*, 823 P.2d 1216, 1218 (Cal. 1992) (noting that father filed paternity action alleging child had not yet been born when mother had actually given birth two days earlier).

<sup>31</sup> "According to some studies, only 4 women in 100 give birth on their due date. Most...deliver within two weeks either way of that date." ARLENE EISENBERG ET AL, HEIDI E. MURKOFF, AND SANDEE E. HATHAWAY, *WHAT TO EXPECT WHEN YOU'RE EXPECTING*, 7 (1996).

<sup>32</sup> W. VA. CODE § 48-24-103 (2001).

<sup>33</sup> In family law practice in West Virginia, it is typically the moving party's responsibility to set the matter for hearing. *See* W. VA. R. PRAC. & P. FOR FAM. L. 10(c) (2000).

<sup>34</sup> Once all blood or tissue samples are gathered, the time it takes to have them analyzed and the report returned varies. The quickest turnaround experienced by the Monongalia County Bureau of Child Support Enforcement is 2 weeks, with the more typical time being four to six weeks. Telephone interview with Garnett Brammer, Legal Secretary, Monongalia County Bureau of Child Support Enforcement (May 30, 2000).

<sup>35</sup> The family law master's jurisdiction to act derives by referral from the circuit court, and, therefore, all final orders must be submitted to the circuit court for its ultimate review and decision. *See* W. VA. CODE §§ 48-30-202(e) & 51-2A-10(a) (1999).

<sup>36</sup> *See* W. VA. CODE § 48-30-202(c) (2001).

<sup>37</sup> Adoption proceedings are not among the matters listed for referral jurisdiction to the family law masters. *See* W. VA. CODE § 51-2A-10(a) (2001).

family law masters.<sup>38</sup> Eventually, a circuit court judge will review the family law master's recommendations with regard to paternity,<sup>39</sup> but the circuit court judge may or may not be the same judge hearing the adoption.<sup>40</sup> Consequently, it is possible for the right hand to act without the knowledge of the left.

In summary, the complexity of nonmarital fathers' rights to consent depends in large part upon whether section 301 or section 501 is applied. If section 501 governs, then it is simple: all biological fathers must be approached for consent without regard to whether they are married to the prospective adoptive child's mother. If section 301 applies, however, only determined nonmarital fathers are entitled to consent, and their opportunity to establish themselves as determined fathers may depend upon the timing of the child's birth and the onset of the adoption proceedings, the willingness of the birth mother to cooperate with establishing paternity or the speed of the court system in adjudicating paternity.

#### B. *West Virginia's Notice Provisions*

A nonmarital father is entitled to notice of the adoption if: 1) he is entitled to be approached for consent;<sup>41</sup> 2) he has had legal or physical custody of the child or has had visitation rights ordered;<sup>42</sup> or 3) he is someone "who, on the basis of a previous relationship with the child, a parent, an alleged parent or the petitioner, can provide relevant information that the court, in its discretion, wants to hear."<sup>43</sup>

The first category of fathers must wrestle with the contradictions embedded in competing consent provisions. If all biological fathers are entitled to consent, then all biological fathers are entitled to notice, making further analysis under the subsequent categories unnecessary. However, if the section 301 approach prevails and only determined fathers are entitled to consent, then further analysis is required.

<sup>38</sup> See W. VA. CODE § 51-2A-10 (a)(2) (1999). With the recent passage of the Unified Family Court Amendment, it is possible that this multi-tiered and fragmented system could change. See 2000 WV. Bal. Meas. 1 (SN); Robert S. Kiss, *Speaker's Column* (last visited Sept. 15, 2001) <<http://www.legis.state.wv.us/House/Famlaw.html>>. However, at the time of the writing of this article the legislature had not yet acted upon the authority given it to create a unified family court system.

<sup>39</sup> See W. VA. CODE § 48-30-202 (2001).

<sup>40</sup> In multi-judge circuits, if the luck of the draw didn't fall in the putative father's favor such that the same judge who hears the adoption will be the same one to decide the paternity question, the nonmarital father might ask that the circuit judge in the paternity action revoke the referral of jurisdiction to the family law master and then attempt to consolidate the paternity case with the adoption case. See W. VA. CODE § 51-2A-10(b) (1999). However, this effort would also require the filing of possibly two motions and more than likely a hearing. Currently, of the thirty judicial circuits in West Virginia, twenty of them have more than one circuit judge. See W. VA. CODE § 51-2-1(a) (1999).

<sup>41</sup> See W. VA. CODE § 48-22-601(a)(1) (2001).

<sup>42</sup> See W. VA. CODE § 48-22-601(a)(3) (2001). It is almost certain that if the nonmarital father had either legal custody or ordered visitation with the child that his paternity has been adjudicated and that he would, therefore, be entitled to notice under (a)(1). The usefulness of this section lies in its mention of physical custody. If the father and child lived together for some period without regard to whether such an arrangement was pursuant to a court order, then he would be entitled to notice.

<sup>43</sup> W. VA. CODE § 48-22-601(b)(3) (2001).

The middle category of fathers entitled to notice, those who have had physical custody of the child at some point, is fairly straightforward. As with all fact-contingent categories, it is subject to abuse by those who supply the facts. In other words, people may lie as to whether the child has actually lived with anyone and if an individual is excluded from notice, he may not know until it is too late that he has been left out. However, under the current statute, those not properly receiving notice may challenge an adoption for up to six months after the final order is entered.<sup>44</sup> Given that the child has to live with the adoptive parents for six months before an adoption proceeds to a final hearing,<sup>45</sup> the nonmarital father has a year from the time of the placement of the child with the adoptive parents to challenge his lack of notice. However, if he raises his objection after the final decree has been entered, his burden is heavy. He must prove "by clear and convincing evidence that the decree or order is not in the best interest of the child."<sup>46</sup>

The last circumstance listed above under which a nonmarital father may receive notice places substantial power in the hands of the circuit judge. If the judge believes that all biological parents should be notified, then the judge can exercise his authority to order notice. If the circuit judge holds the belief that noticing nonmarital fathers will only delay a needed adoption, then he or she will probably ignore the fact that the nonmarital father has received no notice.

Still another method by which a nonmarital father could come to receive notice is by evolving from an unknown father into a known father.<sup>47</sup> The 1997 reforms of the West Virginia adoption statute led to the requirement that a birth mother who alleges that the child's father is unknown shall be required to complete an affidavit concerning certain facts designed to ferret out his identity.<sup>48</sup> The court is required to examine this affidavit and any other evidence it deems fit to determine whether it can identify the father. If the father is identified through this process, then he is entitled to notice of the adoption proceeding.

By this strange twist, an unknown father can come to have greater rights to notice than a known, identified father. The difference between a known and unknown father *vis a vis* his relationship to his child may be negligible. It is even possible that the reason that the mother lists the father as unknown in the first place is because of a justified fear of the father, which would seem to place him in a position of less entitlement to notice than other known fathers who pose no physical threat to the mother or child.<sup>49</sup>

Receiving notice, however, does not bestow veto power. Ultimately, the court will decide whether all relevant parental rights have been terminated, whether

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<sup>44</sup> See W. VA. CODE § 48-22-704(c) (2001).

<sup>45</sup> See W. VA. CODE §§ 48-22-501 and 48-22-701 (2001).

<sup>46</sup> W. VA. CODE § 48-22-704(c) (2001).

<sup>47</sup> For an explanation of the twists and turns of the legislative history leading to this odd result, see Kelly, *supra* note 9, at 53-56.

<sup>48</sup> See W. VA. CODE § 48-22-502(b) (2001).

<sup>49</sup> See W. VA. CODE § 48-22-603(b) (2001).

the adoptive parents are fit, whether all of the statute's requirements have been met, and ultimately, whether the adoption is in the child's best interest.<sup>50</sup> Notice allows the person receiving it to present evidence on these issues. Arguably, a nonmarital father could claim that all relevant parental rights have not been terminated because his are still extant, but this argument begs the earlier question of whether section 301 or section 501 applies.

### III. JUDICIAL AMBIVALENCE: ONE OR MORE CONSTITUTIONAL THEORIES GOVERNING THE RIGHTS OF NONMARITAL FATHERS

A long common law history of differences in treatment between marital and non-marital children under-girds the discrepancies in the treatment their parents' experience under our legal system. To say that the common law privileged the mothers of non-marital children over their fathers would be a gross mischaracterization of the social and legal reality.<sup>51</sup> In fact, the earliest common law was punitive toward mothers who gave birth to children out of wedlock, while at the same time it freed fathers from any claims that such women and children might have against their estates and livelihoods.<sup>52</sup> According to Blackstone, such children were *filius nullius*, the children of no one.<sup>53</sup>

Concern for the public purse ultimately guided the development of the common law's view of the parents of non-marital children. At first, the mother was found to be the primary custodian of the child and the responsible party for his or her support. However, as it became clear that the economically inferior position of women would not allow many women to fulfill this responsibility without help from the state, gradually the common law overcame its reluctance to force the fathers of non-marital children to share their wealth with their nonmarital offspring.<sup>54</sup> The child support system we have in place today replicates this concern in that nonmarital fathers are sought by the state in an effort to establish paternity for the purpose of the payment of child support, thereby defraying the costs to the public by reimbursing the state for any payments it has made on behalf of the child.<sup>55</sup>

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<sup>50</sup> See W. VA. CODE § 48-22-701(a) (2001).

<sup>51</sup> See Mary L. Shanley, *Unwed Fathers' Rights, Adoption, and Sex-Equality: Gender Neutrality and the Perpetuation of Patriarchy*, 95 COLUM. L. REV. 60, 66-70 (1995). For another recitation of the history of fatherhood in the United States, see June Carbone, *The Missing Piece of the Custody Puzzle: Creating a New Model of Parental Partnership*, 39 SANTA CLARA L. REV. 1091, 1096-1104 (1999).

<sup>52</sup> See *id.*; Lisa Kelly, *Divining the Deep and Inscrutable: Toward a Gender-Neutral, Child-Centered Approach to Child Name Change Proceedings*, 99 W. VA. L. REV. 1, 34-45 (1996).

<sup>53</sup> See BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 152 (William H. Browne, ed. 1897).

<sup>54</sup> See Kelly, *supra* note 52, at 35.

<sup>55</sup> See *id.* at n. 134; Lisa Kelly, *If Anybody Asks You Who I Am: An Outsider's View of the Duty to Establish Paternity*, 6 YALE J.L. & FEMINISM 297, 306, n.1 (1994); For a historical review of the turn-of-the-twentieth-century state's approach to both nonmarital and fathers and mothers in the area of state support, see MARY ANN MASON, FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS: THE HISTORY OF CHILD

It is not surprising that in establishing non-marital fathers as financially responsible for their children very little ink was spilled extolling the benefits that fatherhood held for the men whose paternity led to monetary obligations. Unlike Blackstone's revelries about the rights of marital fathers to control and profit from their children,<sup>56</sup> the rights or enjoyments of non-marital fathers were not the focus of the common law's development toward paternal responsibility.

It is not until the 1970's that non-marital fatherhood came to be viewed as a potential right or liberty interest akin to other parents' liberty interests recognized much earlier in the century.<sup>57</sup> Even though the seventies and eighties may have seen attempts to establish formal equality between men and women, the Supreme Court's decisions of that era,<sup>58</sup> when viewed together, do not place non-marital fathers on equal footing with biological mothers and marital fathers. However, they did cede a measure of constitutional protection to non-marital fathers under certain circumstances.

Of course, the Supreme Court's composition also has changed dramatically since 1989, when the last decision on non-marital father's rights was rendered.<sup>59</sup> A recent decision of the current Court,<sup>60</sup> although not directly related to non-marital father's rights in the adoption context, hints that, if faced with an equal protection gender challenge today, the current Court would be more disposed to view non-marital fathers as entitled to the same treatment as non-marital mothers.

Both the United States Supreme Court and the West Virginia Supreme Court of Appeals have addressed the issue of non-marital father's constitutional rights. The West Virginia Supreme Court of Appeals has addressed these issues more recently and has resolved them somewhat more favorably on the behalf of the

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CUSTODY IN THE UNITED STATES 92-96 (1994).

<sup>56</sup> See Kelly, *supra* note 52, at 19-20.

<sup>57</sup> Fundamental parental rights were recognized generally in the early twentieth century in *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (stating that the liberty guaranteed by the constitution includes "the right . . . to marry, establish a home and bring up children") and *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925) (stating that an Act requiring parents to enroll their children in public schools "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control").

<sup>58</sup> See *Stanley v. Illinois*, 405 U.S. 645 (1972); *Quilloin v. Wolcott*, 434 U.S. 246 (1978); *Caban v. Mohammed*, 441 U.S. 380 (1979); *Lehr v. Robertson*, 463 U.S. 248 (1983); *Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

<sup>59</sup> In 1989, the Justices of the United States Supreme Court included Chief Justice William H. Rehnquist (Associate 1972-1986; Chief 1986- ) and Justices William J. Brennan, Jr. (1956-1990), Byron R. White (1962-1993), Thurgood Marshall (1967-1991), Harry A. Blackmun (1970-1994), John Paul Stevens (1975- ), Sandra Day O'Connor (1981- ), Antonin Scalia (1986- ), and the newly-appointed Anthony Kennedy (1988- ). See THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 982 (Kermit Hall, ed. 1988). Today, the Court has retained five of those from its 1989 membership. Justices Brennan, White, Marshall and Blackmun have been replaced with Justices Thomas, Ginsburg, Souter, and Breyer.

<sup>60</sup> See *Miller v. Albright*, 523 U.S. 420 (1998). For articles focusing on the *Miller* case, see Kristin Collins, *When Fathers' Rights are Mothers' Duties: The Failure of Equal Protection in Miller v. Albright*, 109 YALE L.J. 1669 (2000); Katharine Silbaugh, *Miller v. Albright: Problems of Constitutionalization in Family Law*, 79 B.U. L. REV. 1139 (1999).

non-marital father than the United States Supreme Court.<sup>61</sup> However, a very recent decision of the West Virginia Supreme Court of Appeals reflects a continuing ambivalence toward the rights of nonmarital fathers even though it gives them the right to bring tort actions against individuals who interfere with their custodial rights.<sup>62</sup>

Given both the ambivalence of and the time elapsed between the Courts' decisions, divining a coherent constitutional theory is challenging. In this section, I will synthesize what can be gleaned from both Courts as to the scope of constitutional protection afforded nonmarital fathers in order to determine whether the various possible interpretations of West Virginia's statute would withstand constitutional challenge.

#### A. *The Federal Constitutional Analysis*

Despite successful challenges brought by nonmarital fathers to state statutes, the Supreme Court, during the 1970's and 1980's, developed standards which limited constitutional protection to fathers who had developed relationships of some sort with their offspring. Under the final case in this series, however, even if the nonmarital father had established a relationship with the child, his claim would wither against the claim of the child's marital father. In other words, "biology plus relationship" would be trumped by marriage to the child's mother at the time of the child's birth.

These relationship-based standards developed in fits and starts, and always in the context of the older child. The first such case was *Stanley v. Illinois*,<sup>63</sup> decided in 1972. Peter Stanley had lived intermittently with his three children and their mother, Joan Stanley, for a period of eighteen years. When Joan Stanley died, the State of Illinois removed the children without notice or hearing to Peter. Stanley brought an equal protection challenge pointing out that under Illinois law neither unwed mothers nor marital fathers could be deprived of their children without a hearing on fitness.<sup>64</sup> The Court recognized that Stanley's interest "in the children he ha[d] sired and raised, undeniably warrant[ed] deference and, absent a powerful countervailing interest, protection."<sup>65</sup> The Court rejected the state's arguments that most unmarried fathers would be unsuitable and neglectful parents and held that "all Illinois parents are constitutionally entitled to a hearing on their fitness before their children are removed from their custody."<sup>66</sup>

Although the fact of Peter Stanley's relationship with his children and their mother was noted in the case, it was not an integral part of the standard that granted

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<sup>61</sup> See *State of West Virginia, ex rel., Roy Allen S. v. Stone*, 474 S.E.2d 554 (W. Va. 1996).

<sup>62</sup> See *Kessel v. Leavitt*, 511 S.E.2d 720 (W. Va. 1998).

<sup>63</sup> 425 U.S. 645 (1972).

<sup>64</sup> See *id.* at 646.

<sup>65</sup> *Id.* at 651.

<sup>66</sup> *Id.* at 658.

him protection. The Court did, after all, say that *all* of Illinois' parents were entitled to a hearing before their rights were terminated.<sup>67</sup> However, in future cases, the existence of a relationship, particularly a custodial one, would become pivotal.

The biological father in the next case, *Quilloin v. Walcott*,<sup>68</sup> did not fare as well as Peter Stanley. In that case, Leon Quilloin challenged the consent provisions of the Georgia adoption statute which was similar in many respects to the section 301 alternative of the West Virginia statute. Under the Georgia statute, all biological mothers and marital fathers had to provide consent in order for an adoption to proceed, unless their rights had been terminated after notice and hearing. Non-marital fathers, however, were only given the consent veto power if they had "legitimated" their children.<sup>69</sup> The father could legitimate his child either by marrying the mother or obtaining a court order that legitimized the child. Leon Quilloin did not file a legitimation petition until he received notice of the adoption petition filed by the child's stepparent, at which point he also challenged the constitutionality of the consent provisions.<sup>70</sup>

Rather than focusing upon the intricacies of the Georgia adoption statute, the Court looked at the facts to find that, although Leon Quilloin had visited with the child on many occasions,<sup>71</sup> he had not taken steps to financially support or legitimate the child for over eleven years.<sup>72</sup> The Court also emphasized that the adoption petition arose in the context of a step-parent adoption where "the result of the adoption . . . [would be] to give full recognition to a family unit already in existence, a result desired by all concerned, except appellant."<sup>73</sup>

The Court affirmed both the granting of the adoption and the denial of Quilloin's petition for legitimation. In doing so, it found that, by receiving notice and an opportunity to present evidence on the question of the child's best interest, the State of Georgia had provided Quilloin with all of the process to which he was due. The Court implied that a different conclusion might have resulted had this been the case of a non-marital father who had at any time "had or sought, actual or legal custody of his child."<sup>74</sup> However, the Court decided that on the facts of this father's case, the statute did not deprive him of due process.

As to Quilloin's equal protection claim in which he argued that the statute unconstitutionally treated him differently than marital fathers with respect to the exercise of a fundamental right, the Court simply found non-marital fathers distinguishable from marital fathers, even those who are separated or divorce from the child's mother. Marital fathers, the Court proclaimed, partake of "full

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<sup>67</sup> See *id.*

<sup>68</sup> 434 U.S. 246 (1978).

<sup>69</sup> See *id.* at 248-49.

<sup>70</sup> See *id.* at 250.

<sup>71</sup> See *id.* at 251.

<sup>72</sup> See *id.* at 253.

<sup>73</sup> *Quilloin*, 434 U.S. at 255.

<sup>74</sup> *Id.*



responsibility for the rearing of [their] children during the period of the marriage. Under any standard of review, the State was not foreclosed from recognizing this difference in the extent of commitment to the welfare of the child.”<sup>75</sup>

The importance of once having lived with the child would be highlighted in the next case that the Court would consider, *Caban v. Mohammed*.<sup>76</sup> In *Caban*, although the father and mother of the children had never married, they had lived together for five years during which two children were born. Mr. Caban lived with the elder child for four years and the younger child for two.<sup>77</sup> He and the child’s mother both financially supported the children.<sup>78</sup> After the parents’ separated, the father visited with them every week for eighteen months.<sup>79</sup> After the children were taken to Puerto Rico by their maternal grandmother, Caban traveled there and retrieved them, taking them back to New York.<sup>80</sup> A custody battle between father and mother ensued, which resulted in the mother having custody and Caban, visitation rights.<sup>81</sup> In the midst of all of this activity, both parents married other parties, and eventually cross-petitions to adopt were filed by both step-parents.<sup>82</sup>

The mother’s husband’s petition for adoption was granted below because, under New York law, although the mother’s consent was always required, the consent of the non-marital father was not; he was only entitled to notice.<sup>83</sup> Mr. Caban was only permitted to introduce evidence of whether the mother’s husband was fit to adopt.<sup>84</sup> Caban appealed and reached the United States Supreme Court on equal protection and substantive due process grounds.<sup>85</sup>

Rather than adopting an analysis that pitted non-marital fathers against all other parents, the Court focused on the fact that the New York statute treated unwed parents differently based upon their gender and thus applied intermediate scrutiny.<sup>86</sup> The Court rejected the argument that differential treatment was justified by the difference between maternal and paternal relations and found that the facts of this particular case disproved that argument.<sup>87</sup> The Court also rejected the argument that the statute’s gender distinction was justified by the state’s substantial

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<sup>75</sup> *Id.*

<sup>76</sup> 441 U.S. 380 (1979).

<sup>77</sup> *See id.* at 382.

<sup>78</sup> *See id.*

<sup>79</sup> *See id.*

<sup>80</sup> *See Caban*, 441 U.S. at 383.

<sup>81</sup> *See Caban*, 441 U.S. at 383.

<sup>82</sup> *See id.*

<sup>83</sup> *See id.* at 384.

<sup>84</sup> *See id.*

<sup>85</sup> *See id.* at 385.

<sup>86</sup> *See Caban*, at 388.

<sup>87</sup> *See id.* at 389.

interest in having non-marital children adopted into two-parent homes.<sup>88</sup>

The Court, did, however, allow room for the possibility that it might view parental relations with newborns differently. In at least three different places in the opinion, the Court noted that the child's age may make a difference. First, the Court made this less-than-firm-statement: "Even if unwed mothers as a class were closer than unwed fathers to their newborn infants, this generalization concerning parent-child relations would become less acceptable as a basis for legislative distinctions as the age of the child increased."<sup>89</sup> Second, the Court limited its holding with qualifiers relating to the child's age: "We reject, therefore, the claim that the broad, gender-based distinction of § 111 is required by any universal difference between maternal and paternal relations *at every phase of a child's development*."<sup>90</sup> Finally, in addressing the possible impediment to adoption caused by requiring the consent of unwed fathers who may have disappeared, the Court made this qualification:

Even if the special difficulties attendant upon locating and identifying unwed fathers at birth would justify a legislative distinction between mothers and fathers of newborns, these difficulties need not persist past infancy. When the adoption of an older child is sought, the State's interest in proceeding with adoption cases can be protected by means that do not draw such an inflexible gender-based distinction . . . .<sup>91</sup>

*Caban* established the "substantial relationship" test for when a non-marital father's rights should be protected and found that Mr. Caban had amply satisfied that test.<sup>92</sup> When a non-marital father has cultivated a substantial relationship with his child, he is deserving of constitutional protection and gender-specific legislation will not survive against him.<sup>93</sup>

Justice Stevens, joined by then Chief Justice Burger and Justice Rehnquist, wrote a scathing dissent in the *Caban* case that, in most respects, focuses upon the damaging effect the majority's opinion may have in the case of infant adoption. Justice Stevens found compelling the state's interest in enabling an illegitimate child to achieve the status of legitimacy.<sup>94</sup> This dissent also rejected the majority's tendency toward formal equality with the simple declaration, "Men and women are different . . . ."<sup>95</sup> The relevant differences between men and women listed by the dissent include: women can choose whether to have or not have a child; women

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<sup>88</sup> See *id.* at 391.

<sup>89</sup> See *id.* at 389.

<sup>90</sup> *Id.* (emphasis added)

<sup>91</sup> See *Caban*, 441 U.S. at 392 (footnotes omitted).

<sup>92</sup> See *id.* at 393-94.

<sup>93</sup> See *id.*

<sup>94</sup> See *id.* at 402.

<sup>95</sup> *Id.* at 404.

have responsibilities during pregnancy that men do not; women know they are pregnant and men may not know that their child is on the way; at birth the mother is present and known, while the father may not be; and the mother is likely to have custody of the newborn infant.<sup>96</sup> These differences, the dissent concluded, viewed in light of the state's compelling interest in legitimating children, justified the differences in treatment found in the New York statute.<sup>97</sup> In particular, these dissenting Justices wanted to make clear their belief that the difference between men and women certainly justified "a rule that gives the mother of a new born infant the exclusive right to consent to its adoption."<sup>98</sup>

Justice Stevens authored the majority opinion in *Lehr v. Robertson*,<sup>99</sup> the next non-marital father case the Court decided. If knowing that Justice Stevens wrote the opinion does not tell the reader the result for Mr. Lehr, the non-marital father involved, then the first line of the opinion certainly will— "The question presented is whether New York has sufficiently protected an unmarried father's inchoate relationship with a child whom he has never supported and rarely seen in the two years since her birth."<sup>100</sup>

Although *Caban* and *Quilloin* were consent cases, the *Lehr* case involved a challenge to the notice requirements of New York's adoption statute.<sup>101</sup> This case involved another stepparent adoption of a child who had lived with the adoptive father from the time she was eight months old until the petition for adoption was filed when she was two.<sup>102</sup> The New York statute provided a number of ways for a non-marital father to distinguish himself as one entitled to notice and an opportunity to be heard. Among those methods was the mailing of a card signifying a notice of intent to claim paternity to the putative father registry.<sup>103</sup> Lehr had not met the notice requirements, although he had filed a paternity action which was pending at the time of the adoption proceeding and of which the judge in the adoption proceeding had been made aware.<sup>104</sup>

Lehr challenged the statute by alleging that it had deprived him of due process and equal protection.<sup>105</sup> In considering his due process claim, the Court

<sup>96</sup> See *Caban*, 441 U.S. at 404-5.

<sup>97</sup> See *id.* at 407.

<sup>98</sup> *Id.* at 407.

<sup>99</sup> 463 U.S. 248 (1983).

<sup>100</sup> *Id.* at 249-50.

<sup>101</sup> See *id.* at 250.

<sup>102</sup> See *id.* at 251.

<sup>103</sup> The other methods by which the father could establish himself as entitled to notice included: paternity adjudication by New York or any other state if the other state's order was on file with the putative father registry; being recorded on the child's birth certificate as the father; by openly living with the mother and child at the time the adoption was initiated; by marrying the mother within six months after the child's birth. See *Lehr v. Robertson*, 463 U.S. 248, n. 5 (1983).

<sup>104</sup> See *id.* at 252-5.

<sup>105</sup> See *id.* at 250.

sought to define the nature of the interest involved. In so doing, the Court reviewed and synthesized its holdings from *Stanley* forward<sup>106</sup> and concluded with language that is now the most frequently quoted passage in most state court cases grappling with these issues.<sup>107</sup>

The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development. If he fails to do so, the Federal Constitution will not automatically compel a state to listen to his opinion of where the child's interests lie.<sup>108</sup>

The dissent painted a different picture of the facts in *Lehr*. It portrayed a thwarted father who had sought to visit his child but whose efforts had been rebuffed and frustrated by the child's mother who had married another man with whom she sought to have her child bond.<sup>109</sup>

The fact that the majority was not persuaded by the dissent's narrative, which *Lehr* was never able to support with evidence given the state's failure to afford him a hearing, is noteworthy. The majority, instead, faulted *Lehr* for failing

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The Court synthesized its holdings by focusing upon the nature of the parent-child relationship involved in the facts of each case and concluded with:

The difference between the developed parent-child relationship that was implicated in *Stanley* and *Caban*, and the potential relationship involved in *Quilloin* and this case, is both clear and significant. When an unwed father demonstrates a full commitment to the responsibilities of parenthood by "com[ing] forward to participate in the rearing of his child," his interest in personal contact with the child acquires substantial protection under the Due Process Clause. At that point it may be said that he "act[s] as a father toward his children." But the mere existence of a biological link does not merit equivalent constitutional protection.

*Id.* at 261 (citations omitted).

<sup>107</sup>

Among just a few of the more recent adoption cases, this language can be found in: *M.V.S. v. M.D.*, 1999 WL 1100860 (Ala. Civ. App. Dec. 3, 1999) (upholding Alabama's putative father registry); *In re D. B., a child.*, 2000 WL 369806, 1 (Ga. App. April 12, 2000) (upholding Georgia statute requiring father to file paternity action in order to preserve parental rights); *In re D.S.P.*, 504 S.E.2d 211, 213 (Ga. App. 1998) (upholding the dismissal of non-marital father's paternity action and affirming adoption based on father's pre-birth conduct) (Ga. App. 1998); *Walker v. Campbell*, 711 N.E.2d 42, 51 (Ind. Ct. App. 1999) (upholding non-marital father's challenge to Indiana's adoption statute); *In re K.J.R. & D.F.R.*, 687 N.E.2d 113, 124 (Ill. Ct. App. 1997) (upholding exclusion of non-marital father from adoption proceedings where he failed to file as required with the putative father registry); *In the Matter of H.M.M.*, 2000 WL 256159, \*2 (La. App. 2 Cir. Mar. 7, 2000) (relied upon to uphold termination of father's rights based upon pre-birth conduct); *Humphrey v. Pannell*, 710 So.2d 392, 398 (Miss. 1998) (upholding the exclusion of outsider fathers from adoption proceedings); *In re Baby Boy W.*, 988 P.2d 1270, n. 1 (Okla. 1999) (upholding judgment for natural father because he had been deprived of chance to "grasp" his parental "opportunity" interest in the child).

<sup>108</sup>

See *Lehr*, 462 U.S. at 262 (citations omitted).

<sup>109</sup>

See *id.* at 270-77.

to comply with the requirements of the putative father registry, about which he claimed no knowledge.<sup>110</sup> In focusing upon the putative father registry, the Court emphasized that this was a simple method provided by the State which was totally within Lehr's control.<sup>111</sup> Having provided him with this opportunity, as well as the many others to make himself available for notice, the state had afforded this putative father due process.<sup>112</sup>

In the Court's final case in this series, we learn that even a parent-child relationship that has developed through sharing custody with the child's mother will not overcome the Court's strong bias in favor of legitimacy. In *Michael H. v. Gerald D.*,<sup>113</sup> the biological father of a child born during the marriage of the child's mother to another man was found to be outside the scope of constitutional protection.<sup>114</sup> The Court, in an opinion by Justice Scalia, upheld a California statute which blocked the bringing of paternity actions by such outsider fathers finding that such fathers are not part of a traditionally protected family unit.<sup>115</sup>

Read together, these cases reflect the protection that the Court has bestowed upon the traditional nuclear, and, preferably, marital family.<sup>116</sup> Of course, this point has been made consistently in cases involving older children whose actual custodial relationships would not be altered by the adoption. What the Court will do if it accepts a case that will require it to face a challenge by a non-marital father in a newborn infant adoption involving placement outside the biological mother's home still remains to be seen.<sup>117</sup>

The *Michael H.* case was decided in 1989,<sup>118</sup> and *Lehr*, in 1983.<sup>119</sup> The Court's composition has changed since that time. What would today's Court do if it chose to avail itself of the opportunity to hear another nonmarital father case, perhaps one involving a newborn? Of course, the odds on prognosticating correctly here are only slightly better purchasing a winning lottery ticket. Nevertheless, there

<sup>110</sup> See *id.* at 264.

<sup>111</sup> See *id.* at 263-66.

<sup>112</sup> See *id.* at 265.

<sup>113</sup> 491 U.S. 110 (1989).

<sup>114</sup> See *id.* at 115.

<sup>115</sup> See *id.* at 124.

<sup>116</sup> In addition to the holding in *Michael H.*, the Court had voiced its preference for marriage in prior cases as well. For example, in *Lehr*, the Court noted that "The most effective protection of the putative father's opportunity to develop a relationship with his child is provided by the laws that authorize formal marriage and govern its consequences." *Lehr v. Robertson*, 463 U.S. 248, 263 (1983).

<sup>117</sup> The Court has had the opportunity to hear such cases, but has declined. See *Adoption of Baby E.A.W. v. J.S.W.*, 658 So.2d 961 (Fla. 1995), *cert. denied*, 116 S. Ct. 719 (1996); *Adoption of J.J.B. v. Bookert*, 894 P.2d 994 (N.M. 1995), *cert. denied*, 515 U.S. 860 (1995); *In re Petition of Doe*, 638 N.E.2d 181 (Ill. 1994), *cert. denied*, 513 U.S. 994 (1994); *Raquel Marie X.*, 559 N.E.2d 418 (N.Y. Ct. App. 1990), *cert. denied*, 498 U.S. 984 (1990).

<sup>118</sup> See *Michael H.*, 491 U.S. 110.

<sup>119</sup> See *Lehr*, 463 U.S. 248.

are a few substantial clues that could help make a prediction.

One might be tempted to predict that, based on the Court's murmurings about the importance of the child's age found in *Caban*,<sup>120</sup> the Court would find it right and proper, indeed only natural, to treat mothers of newborns differently than non-marital fathers. After all, as Stevens and Rehnquist, who are still on the Court, pointed out in the *Caban* dissent "men and women are different"<sup>121</sup> Even the majority seemed willing to indulge, for purposes of argument, the assumption that mothers of newborns are closer to their children and easier to find than the non-marital fathers of newborns.<sup>122</sup> However, the membership of that majority has changed since 1979 when *Caban* was decided, and a recent opinion of the current Court ought to be considered when attempting to predict the Court's possible thoughts on the subject.

In 1998, the Court decided *Miller v. Albright*,<sup>123</sup> a case involving a challenge to the federal statute governing the proof required for the naturalization of non-marital children born to citizen fathers abroad.<sup>124</sup> The petitioner, Lorelyn Penero Miller, was a 28 year-old Filipino woman whose mother was also Filipino but whose father was an American serviceman stationed in the Philippines at the time she was conceived.<sup>125</sup> Her mother and father never married.<sup>126</sup> The petitioner lived in the Philippines until she was at least 21 years old.<sup>127</sup> Her father resided in Texas at the time that she attempted her naturalization.<sup>128</sup> He did not oppose her petition to establish him as her father and in all other ways cooperated with the steps she took toward naturalization.<sup>129</sup>

The statute governing the naturalization of non-marital children born abroad treated the children of citizen mothers differently than those of citizen fathers.<sup>130</sup> The foreign-born, non-marital children of citizen mothers needed only to prove that their mothers were nationals of the United States at the time of their birth and "had previously been physically present in the United States or one of its outlying possessions for a continuous period of one year."<sup>131</sup> The foreign-born, non-marital children of citizens fathers, on the other hand, not only had to meet the

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<sup>120</sup> See *Caban*, 441 U.S. 380.

<sup>121</sup> *Id.* at 404.

<sup>122</sup> See *id.* at 389, 392.

<sup>123</sup> 523 U.S. 420.

<sup>124</sup> See *id.* at 420.

<sup>125</sup> See *id.* at 425.

<sup>126</sup> See *id.*

<sup>127</sup> See *id.*

<sup>128</sup> See *Miller*, 523 U.S. at 425.

<sup>129</sup> See *id.*

<sup>130</sup> See 8 U.S.C. §1409(c) (1994).

<sup>131</sup> See *Miller*, 523 U.S. 420, at n. 7 (citing 8 U.S.C. § 1409(c)).

requirements of proof for the children of citizen mothers, but they also had to prove: 1) a blood relationship to the father by clear and convincing evidence; 2) that the father had agreed in writing to support the child until s/he was eighteen; and 3) that before the child was eighteen, paternity had been adjudicated.<sup>132</sup> The only applicable requirement that Ms. Miller was unable to meet was that she achieved paternity adjudication before the age of eighteen.<sup>133</sup>

Lorelyn Pereno Miller challenged the differences in treatment that she received as the nonmarital child of a citizen father as opposed to being the non-marital child of a citizen mother.<sup>134</sup> The opinion of the Court that resulted was very fractured, thereby allowing a close look at how individual Justices might view non-marital fathers and mothers in an adoption context today.

Justice Stevens, joined by Chief Justice Rehnquist, wrote the opinion for the Court.<sup>135</sup> As one might predict, these two justices upheld the constitutionality of the statute,<sup>136</sup> but it is important to note how they did so. These Justices saw the relevant distinction to be the differences in treatment between groups of non-marital children, rather than between non-marital fathers and non-marital mothers.<sup>137</sup> This categorization allowed them to decide the case using the "arbitrary and invidious" standard<sup>138</sup> rather than the more rigorous intermediate standard employed for gender-based classifications. Nevertheless, these two justices pointed out that they also believed the statute would pass the heightened scrutiny used for gender distinctions.<sup>139</sup>

In finding that the statute met both standards, Justice Stevens relied upon many of his familiar reasons, i.e. that men and women are different when it comes to childbearing and childrearing.<sup>140</sup> He pointed out, for example, that it is proper to require proof of paternity when "the blood relationship to the birth mother is immediately obvious and is typically established by hospital records and birth certificates; the relationship to the unmarried birth father may often be undisclosed and unrecorded in any contemporary public record."<sup>141</sup> He also concluded with pointing once again to "the biological differences between single men and single women"<sup>142</sup> as providing "a relevant basis for differing rules governing their ability

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<sup>132</sup> See *id.* at 431.

<sup>133</sup> See *id.* at 432.

<sup>134</sup> See *id.* at 421.

<sup>135</sup> See *id.* at 420.

<sup>136</sup> See *Miller*, 523 U.S. 420, at 420-22.

<sup>137</sup> See *id.* at 422.

<sup>138</sup> *Id.* at 424.

<sup>139</sup> See *id.* at 440-4.

<sup>140</sup> See *id.* at 421-22.

<sup>141</sup> See *Miller*, 523 U.S. 420, at 436.

<sup>142</sup> *Id.* at 445.

to confer citizenship on children born in foreign lands.”<sup>143</sup>

Justice Stevens also looked to purposes that would support the creation of some semblance of a family unit, another important theme of the earlier cases. In upholding the requirement that blocked Ms. Miller, Justice Stevens pointed to the important purpose that the time requirement served in “encouraging the development of a healthy relationship between the citizen parent and the child while the child is a minor; and the related interest in fostering ties between the foreign-born child and the United States.”<sup>144</sup>

The Court’s opinion tells us that Justice Stevens and Chief Justice Rehnquist continue to hold the same views we have heard in the earlier cases, but what of the remainder of the Court? The often key swing votes of Justices Kennedy and O’Connor came together in their concurring opinion.<sup>145</sup> This opinion is critical because the Justices concur but make clear that they do so only because the distinction is between different classes of non-marital children and not their parents. Of most interest is the following passage:

Although I do not share Justice Stevens’ assessment that the provision withstands heightened scrutiny . . . , I believe it passes rational scrutiny for the reasons he gives for sustaining it under the higher standard. *It is unlikely, in my opinion, that any gender classifications based on stereotypes can survive heightened scrutiny*, but under rational scrutiny a statute may be defended based on general classifications unsupported by empirical evidence.<sup>146</sup>

With this language, the always important Justices Kennedy and O’Connor provide us with a clue as to how they might view a current challenge to an adoption statute that treats non-marital fathers and mothers differently. Who else might agree with them?

Justice Breyer authored a dissent in *Miller* in which Justices Souter and Ginsburg joined.<sup>147</sup> In this dissent, these three justices argued that the statute at issue was really about differences in treatment of non-marital fathers and mothers and, hence, the heightened scrutiny standard should apply.<sup>148</sup> The justices went on to point out where the true count on this issue lies:

As Justice O’Connor has observed, and *as a majority of the Court agrees*, “[i]t is unlikely ... that any gender classifications based on

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*Id.*

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*Id.* at 438.

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*See id.* at 445.

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*See Miller*, 523 U.S. 420, at 451-52 (emphasis added).

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*See id.* at 471.

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*See id.*



stereotypes can survive heightened scrutiny.' These two gender-based distinctions lack the 'exceedingly persuasive' support that the Constitution requires. Consequently, the statute that imposes them violates the Fifth Amendment's 'equal protection' guarantee.

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What of the two stray justices remaining, Justices Scalia and Thomas? They concurred in the Court's opinion but for reasons totally unrelated to the equal protection analysis involved. Instead, Justice Scalia authored a concurring opinion in which he agreed with the outcome of the case but only because he felt that the Court lacked the power to give Ms. Miller the relief she requested.<sup>150</sup> These two justices maintained that the Constitution grants authority only to Congress on matters relating to naturalization.<sup>151</sup>

Even with two justices ducking the gender issue involved in this case, a majority of the Court does seem to hold that, had this case been brought by a non-marital father, instead of his daughter, the statute would not have survived. The impact that this rather formalistic approach to equality might have on an adoption statute is not absolutely clear, although the justices seem rather unequivocal in their stand against "gender stereotyping." It is always possible that the Court could attempt to distinguish its remarks here as only applying to this particular statute. The Court could also distinguish the state's interests in an adoption case from the state's interest in naturalization proceedings.

However, if this newly consolidated majority were to apply its views strictly to the adoption context, it would seem that, particularly in the context of newborn adoptions, where the father has not had the opportunity to establish a relationship with the child, statutes which treat non-marital fathers and mothers differently are vulnerable. After all, the individual father has not had an opportunity to prove himself as responsible or irresponsible, interested or disinterested. Upon what basis can the state justify a difference in treatment other than the gender stereotypes that the majority of justices here appear to shun?<sup>152</sup>

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149 *Id.* at 471-72. (emphasis added, citations omitted).

150 *See id.* at 422.

151 *See Miller*, 523 U.S. 420, at 452-53.

152 Perhaps California's Supreme Court articulated the difference in treatment between non-marital fathers and mothers best when it reasoned through the unstated assumption that adoption is always better for children than life with their non-marital fathers:

If the possible benefit of adoption were by itself sufficient to justify terminating a parent's rights, the state could terminate an unwed mother's parental rights based on nothing more than a showing that her child's best interest would be served by adoption. Of course, that is not the law; nor do the parties advocate such a system. We simply do not in our society take children away from their mothers--married or otherwise--because a "better" adoptive parent can be found. We see no valid reason why we should be less solicitous of a father's efforts to establish a parental relationship with his child. Respondents seem to suggest that a child is inherently better served by adoptive parents than by a single, biological father but that the child is also inherently better served by a single, biological mother than by adoptive parents. The logic of this view is not apparent, and there is no evidence in the record to support such a counterintuitive view.

### B. *The State Constitutional Analysis*

It is critical, of course, that any West Virginia adoption statute meet not only the requirements of the federal but the state constitution. In some respects, the West Virginia Supreme Court of Appeals has interpreted the West Virginia Constitution to require slightly more protection of the non-marital fathers' rights than the United States Supreme Court has in its *Stanley-to-Michael H.* line of cases.

In *Roy Allen S.*,<sup>153</sup> the West Virginia Supreme Court of Appeals extended the protection of the *Stanley* through *Lehr* cases to the type of father that was left unprotected by *Michael H.* In *Roy Allen S.*, a man contending to be the father of a child born during the mother's marriage to another man challenged the West Virginia paternity statute that failed to provide him standing to bring such a paternity action.<sup>154</sup> The West Virginia Supreme Court of Appeals, in an opinion authored by then-Justice Cleckley, found the statute unconstitutional insofar as it completely blocked all non-marital fathers in this position from bringing a paternity action.<sup>155</sup>

The Court explicitly rejected Justice Scalia's opinion in *Michael H.*<sup>156</sup> and recognized that "where a biological father has made a 'substantial' personal investment in his relationship with his child, he acquires a liberty interest in maintaining that relationship,"<sup>157</sup> without regard to whether the mother of the child

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Adoption of Kelsey S., 823 P.2d 1216, 1234 (Cal. 1992).

<sup>153</sup> 474 S.E.2d 554 (W. Va. 1996).

<sup>154</sup> See *id.* at 558-59.

<sup>155</sup> See *id.* at 567.

<sup>156</sup> Justice Cleckley wrote:

We are, therefore, in obvious disagreement with Justice Scalia's contention, which was joined in by only one other justice, that liberty interests should be defined only at the most specific level of our society's traditions. Such a reading runs contrary to the holdings of many cases, fails to accord proper respect to diversity and individualism, and pretty much protects only those liberties that rarely need judicial protection.

*Id.* at 562 (citations omitted).

In cases decided before the decision in *Michael H.*, Louisiana courts were willing to take the approach argued unsuccessfully by Victoria, the child at issue in *Michael H.* Victoria argued that she had two fathers and should be allowed to maintain relationships with both. Long before *Michael H.*, Louisiana was willing to accept that some children actually do have dual fathers. See *Durr v. Blue*, 454 So.2d 315 (La. Ct. App. 3d Cir. 1984) (finding that biological father's due process rights were violated when he was denied the opportunity to withhold consent in an adoption because the child's legal father provided it); *Succession of Mitchell*, 323 So.2d 451 (La.1975) (recognizing that children have rights to the succession of their biological father even though the child was married to another man and that man remains the child's legal father); *Warren v. Richard*, 296 So.2d 813 (La.1974) (recognizing the right of a child to recover for the wrongful death of its biological father even though the child was married to another man and that man remains the child's legal father).

<sup>157</sup> See *Roy Allen S.*, 474 S.E.2d at 563.

was married to someone else at the time the child was conceived or born.<sup>158</sup> However, the father in such a circumstance must prove that substantial relationship with the child by clear and convincing evidence.<sup>159</sup> Finally, the Court also recognized an important, possibly countervailing, state interest in protecting the best interests of the child.<sup>160</sup> Accordingly, the Court held that the putative father must also prove by clear and convincing evidence “that the child will not be harmed by allowing the paternity action to proceed.”<sup>161</sup>

*Roy Allen S.* was decided in 1996, the year that the West Virginia legislature began its study of its adoption statute.<sup>162</sup> The statute’s amendments reflected the recent *Roy Allen S.* decision by the inclusion of the “outsider father,” which is defined as “the biological father of a child born to or conceived by the mother while she is married to another man who is not the father of the child.”<sup>163</sup> Adjudicated outsider fathers or those whose paternity petitions are pending at the time of the adoption petition are required to be approached for consent,<sup>164</sup> and therefore, also would be among those entitled to notice.<sup>165</sup>

Even more recently than *Roy Allen S.*, the West Virginia Supreme Court of Appeals has engaged in a rather lengthy discussion of the relative rights and responsibilities of non-marital fathers and mothers in its 1998 opinion, *Kessel v. Leavitt*.<sup>166</sup> *Kessel* did not involve a constitutional challenge to any statute affecting non-marital father’s rights; instead, it was a case establishing two new torts:<sup>167</sup> 1) the conspiracy to commit fraudulent concealment of a child;<sup>168</sup> and 2) tortuous

<sup>158</sup> See *id.* at 565.

<sup>159</sup> See *id.*

<sup>160</sup> See *id.* at 566.

<sup>161</sup> *Id.* at 567. Accord *In re Marriage of Ross*, 783 P.2d 331, 338-39 (Kan. 1989) (holding that judge must determine whether it is in child’s best interest to determine paternity before ordering blood tests to ascertain if presumed father is the biological father). Even California, the state which brought us *Michael H.*, has found a way to distinguish its effects to allow an outsider father with a relationship to the child to assert his paternity. See *Brian C. v. Ginger K.*, 77 Cal. App. 1198, 1200-01 (2000). For a decision allowing a similarly situated outsider father to have paternity testing compelled without even first proving a substantial relationship with the child and even over the objection of the mother and presumptive marital father, see *Witso v. Overby*, 609 N.W.2d 618, 619-20 (2000). But see *McHone v. Sosnowski*, 609 N.W.2d 844, 846-47 (2000) (stating that a man can’t pursue claim that he is father of child born to another man’s wife).

<sup>162</sup> See *Kelly*, *supra* note 9, at 13.

<sup>163</sup> W. VA. CODE § 48-22-113 (2001).

<sup>164</sup> W. VA. CODE § 48-22-301(a)(2) (2001).

<sup>165</sup> W. VA. CODE § 48-22-601(a)(1).

<sup>166</sup> 554 S.E.2d 720 (W. Va. 1998).

<sup>167</sup> A similar tort has been recognized in Mississippi under facts very close to those involved in the *Kessel* case in an opinion issued just months after *Kessel*. See *Smith v. Malouf*, 722 So. 2d 490, 498 (Miss. 1998).

<sup>168</sup> See *Kessel*, 554 S.E.2d 720, at Syl. Pt. 5.

interference with a parental or custodial relationship.<sup>169</sup>

Even though *Kessel* was a tort case, it is important to an understanding of the Court's views of non-marital fathers. The facts of *Kessel* arose in the context of an infant adoption.<sup>170</sup> The child was born to an unwed mother who was a West Virginia resident giving birth to the child in California.<sup>171</sup> The child ultimately was placed with a Canadian couple.<sup>172</sup> The mother was assisted in this placement by Leavitt, a California lawyer.<sup>173</sup> Under Canadian law it was not required that non-marital fathers be approached for consent or receive notice.<sup>174</sup>

The child's father filed a paternity action in West Virginia and asked for an injunction prohibiting the mother from placing the as-yet unborn child for adoption.<sup>175</sup> The mother was not in West Virginia at the time that the paternity action was filed.<sup>176</sup> The father was successful in obtaining a temporary ex parte injunction approximately one month before the child's birth,<sup>177</sup> despite the fact that the West Virginia paternity statute would not seem to allow such an action.<sup>178</sup>

The father sought to serve the paternity action and injunction upon the mother's brother who was also a lawyer in the community where the mother had been residing in West Virginia.<sup>179</sup> However, the brother rejected service as neither her attorney nor co-resident.<sup>180</sup> Nevertheless, the opinion tells us that Leavitt had the paternity action in hand during the time that the child's ultimate placement was being finalized.<sup>181</sup> Service of the paternity action by publication was perfected on the exact date that the adoptive Canadian couple took the child back to Canada with them.<sup>182</sup>

Eventually, after litigation in both California and in West Virginia to establish paternity, the father together with his father (the paternal grandfather of the adoptive child) brought an action in Cabell County Circuit Court against the

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<sup>169</sup> See *id.* at Syl. Pt. 6.

<sup>170</sup> See *id.* at 735.

<sup>171</sup> See *id.*

<sup>172</sup> See *id.* at 736.

<sup>173</sup> See *Kessel*, 554 S.E.2d 720, at 736.

<sup>174</sup> See *id.* at 738.

<sup>175</sup> See *id.* at 735.

<sup>176</sup> See *id.*

<sup>177</sup> See *id.* at 735-63.

<sup>178</sup> See *infra* Part I. It appears that, given the procedural posture of the paternity case, i.e. its failure even to be served properly upon the biological mother until the child had been placed, a motion to dismiss the action was never filed.

<sup>179</sup> See *Kessel*, 554 S.E.2d 720, at 735.

<sup>180</sup> See *id.* at 736.

<sup>181</sup> See *id.* at 737.

<sup>182</sup> See *id.* at 736.

mother, her lawyer, and several of her family members in which the father "asserted claims of fraud, civil conspiracy, tortuous interference with parental relationship, outrage, violation of constitutional rights, and tortuous interference with and deprivation of grandparental relationship."<sup>183</sup>

A jury heard the claims and awarded the father compensatory damages of \$2 million and punitive damages of \$5.85 million against the mother, her lawyer, and her family members.<sup>184</sup> After establishing the contours of two torts previously not known in West Virginia, the Court affirmed the jury's decision and award without remand, even though the Court expressly rejected the application of the one tort against the mother.<sup>185</sup>

In finding for the father in this case, the West Virginia Supreme Court of Appeals did more than simply betray its sympathies for a non-marital father in the newborn infant adoption context. It also reviewed the constitutional rights of nonmarital fathers in general and pronounced its somewhat ambivalent view as to how they should be considered at the time of the child's birth.

The Court adopts the view found in *Lehr* that characterizes the non-marital father's rights as one of opportunity and extends it to the newborn situation.<sup>186</sup> The Court reviews the decisions of many states and concludes that

the instant a child is born, both unwed biological parents have a right to establish a parent-child relationship with their child. To preserve his parental interest vis-a-vis his newborn child, an unwed biological father must, upon learning of the existence of his child, demonstrate his commitment to assume the responsibilities of parenthood by coming forward to participate in the care, rearing and support of his newborn child and by commencing to establish a meaningful parent-child relationship with his child.<sup>187</sup>

Despite footnotes seeking to make clear that by equalizing mothers' and fathers' rights to their newborn children the Court intends neither to foreclose a woman's right to choose to terminate her pregnancy<sup>188</sup> nor to award rapists constitutional rights with regard to the offspring produced by rape,<sup>189</sup> the Court does not clearly state what actions should evidence the father's commitment to parenthood.

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<sup>183</sup> *Id.* at 739.

<sup>184</sup> *See Kessel*, 554 S.E.2d 720, at 739.

<sup>185</sup> *See id.* at 825. Justice Workman, joined by Justice McHugh, concurred in part and dissented in part with the majority's opinion, and argued that a remand for a new trial with clear instructions under the newly defined law would have been the proper result. *See id.* at 825-28.

<sup>186</sup> *See id.* at 746-47.

<sup>187</sup> *Id.* at 756.

<sup>188</sup> *See Kessel*, 554 S.E.2d 720, at n.33, n.35.

<sup>189</sup> *Id.* at n.30.

In the Court's review of the many cases decided by several states on non-marital fathers' rights to their newborn children, a lengthy footnote appears which does cite, among other things, that certain states look to pre-birth conduct to determine whether a non-marital father of a newborn child has taken the steps necessary to preserve his parent-child relationship. This footnote does detail the types of conduct considered by those states.<sup>190</sup> Among the types of pre-birth acts listed in this footnote are: 1) the father's public acknowledgment of paternity; 2) payment of pregnancy and birth expenses commensurate with his means; 3) prompt legal action to seek custody; 4) indicating, before birth, his opposition to the child's adoption; 4) seeking notice of and actively participating in the adoption proceeding; 5) attempting to have himself designated as the father on the child's birth certificate; and 6) legitimating his child by marrying the 'child's mother.<sup>191</sup> However, these criteria are nowhere adopted by the Court; they are simply cited to in a footnote that follows a discussion of the difficulty that a father may have in asserting paternal rights when his agenda conflicts with that of the mother.<sup>192</sup>

Even though no true constitutional issue was involved in this case given the lack of state action by any of the defendants, the Court does hold, after reviewing other state decisions dealing with thwarted fathers, that "John would have a valid basis for asserting a constitutionally protected right to establish a parent-child relationship with his son despite his inability to have his physical custody or to visit with him prior to his pre-adoptive placement into Canada."<sup>193</sup> So, it would appear that if a father, at least, went to the lengths of the father in this case, that he had met the Court's vision of commitment to his child.

However, it is in the footnote to the Court's pronouncement of John's constitutionally protected status that the Court's ambivalence is revealed. In footnote 31, the Court imports the "best interest of the child" standard into this constitutional consideration. Relying upon *Roy Allen S.*, the Court notes that "whether an unwed biological father will be permitted to maintain a relationship with his child,"<sup>194</sup> requires consideration of "whether maintenance of that relationship is in the child's best interests."<sup>195</sup> The footnote also recommends "that, in future cases affecting the permanent custody of a child, a guardian ad litem be appointed to ensure that any proposed custodial arrangement does in fact benefit and promote the child's safety and well-being."<sup>196</sup>

The "best interest of the child standard" as it arose in the *Roy Allen S.* case, however, seemed to come out of the Court's consideration of what the Court believed was a valid state interest in preserving the integrity of the traditional,

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190 *Id.* at n.29.

191 *Id.*

192 *Id.* at 749.

193 *See Kessel*, 554 S.E.2d 720, at 749-50.

194 *Id.* at n.31.

195 *Id.*

196 *Id.*

nuclear family.<sup>197</sup> It makes sense that, in circumstances where an outsider father seeks to inject himself into a family in which his biological child may have lived for years and where the child has lived with one biological parent, the father's right should give way to the child's best interest. It appears in *Kessel*, however, that the Court is injecting this "best interest of the child" standard into all non-marital father disputes, including those involving newborns when such bonds have not yet been irreversibly fixed.

Although "the best interest of the child standard" has long been used to resolve disputes between parents with perceived liberty interests in their children, it has rarely been used to resolve disputes between constitutionally protected parents and biological strangers.<sup>198</sup> It seems what the Court giveth to the non-marital father in the main body of the opinion it taketh away by footnote.<sup>199</sup>

Even though the lengthy discourse on non-marital fathers' constitutional rights found in *Kessel* is arguably dicta, one could argue that in some ways its content should be as noteworthy as an actual holding on the issue itself. *Kessel* was a tort case. There was no need for the Court to delve so deeply into non-marital fathers' constitutional rights. Nevertheless, the majority opinion, which covers one hundred and five pages, spends considerable energy reviewing what other states have decided and does take the trouble of pronouncing that the father here had a constitutionally protected right to form a relationship with his son. Even Justice Workman's concurring opinion points out her agreement with the majority on the constitutionally protected right of both parents to establish a relationship with their newborn child.<sup>200</sup>

Additionally, we here in West Virginia also know the precedential power

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See *See Roy Allen S.*, 474 S.E.2d at 565-67.

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Even the most recent United States Supreme Court case of *Troxel v. Granville*, 530 U.S. 57, 65-66 (2000), which struck down Washington's third-party visitation statute is premised on the idea that parents, not courts or third parties, have the right to determine what is in their children's best interests.

For cases clearly enunciating this principle, see *In re S.B.*, 2000 WL 575934, \*5-6 (Tenn. Ct. App. May 12, 2000) (rejecting claim of adoptive child's relative to family rights similar to that of parental rights which should place her in a position superior to those unrelated to the adoptive child who were also petitioning to adopt); *Watkins v. Nelson*, 748 A.2d 558, 562 (N.J.) (holding that in order for maternal grandparents, who had had custody of their three and one-half-year-old non-marital granddaughter since the child was twelve days old, to defeat unwed father's claim for the child's custody they must show that he was unfit); *Schuh v. Robertson*, 788 S.W.2d 740, 741 (Ark. 1990) (holding that a third party must show that "the parent is not a suitable person to have the child" in order to deny that parent custody); *Petersen v. Rogers*, 445 S.E.2d 901, 902 (N.C. 1994) (holding that parents have constitutional rights to custody of children barring unrelated third parties from bringing claims for custody); *McDonald v. Wrigley*, 870 P.2d 777, 779 (Okla. 1994) (holding that a third party must show that a parent is unfit in order to successfully bring a custody claim). But see *Charles v. Stehlik*, 744 A.2d 1255, 1258-59 (Pa. 2000) (holding that trial court properly ruled that a young boy's stepfather should have primary custody of the child following his mother's death rather than the out-of-state father that he barely knew, relying upon prior holdings that best interest of the child can justify a non-parent custody award, even the biological parent has not been shown to be unfit).

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For a discussion of the parental rights doctrine's underlying presumption that a child's best interests are served by being raised by a fit biological parent. See Alexandra Dylan Lowe, *Parents and Strangers: The Uniform Adoption Act Revisits the Parental Rights Doctrine*, 30 FAM. L. Q. 379 (1996).

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See *id.* at 825.

of the syllabus point.<sup>201</sup> Syllabus point 4 also clearly reiterates the right of both unwed parents to establish a parent-child relationship with his or her child "the instant a child is born."<sup>202</sup> Clearly, *Kessel* is an opinion to be reckoned with when testing the current statute for constitutionality.

### C. *The Constitutionality of West Virginia's Adoption Statute*

Clearly, if section 501 of the West Virginia statute is found to be controlling and all non-marital fathers are entitled to both consent and notice, then West Virginia's statute is constitutional. Under section 501, non-marital fathers are treated identically with marital fathers and birth mothers. However, the statute in too many other places makes distinctions between marital fathers, determined fathers, birth mothers, and outsider fathers for this article to stop here. If the legislature meant for biological parents to be treated equally with regard to notice and consent, why not just say so in the consent and notice provisions?

If we assume that section 301 governs, then only determined fathers are entitled to the veto power of consent. Only determined fathers together with those who had physical custody of the child at some point are definitely entitled to notice. The ultimate question of this article is whether that is enough to meet constitutional standards.

If *Miller* is predictive of the United States Supreme Court's future action in adoption cases, then clearly it is the strictest of all standards that could be applied. In *Miller*, the Court rejects statutes that are based on gender stereotypes and the majority appears to reject Justice Stevens' opinion that non-marital fathers and non-marital mothers can be treated differently because of the biological differences of pregnancy and childbirth. It would seem that, under *Miller*, the state would be required to articulate an exceedingly persuasive reason for its differences in treatment of non-marital mothers and fathers, likely one that is supported not by assumptions or generalizations, but by empirical evidence. This difficult standard is one that our statute, particularly as applied to the consent provisions of section 301, could not survive.

In case the reader is not persuaded that *Miller* will be applied full strength in the adoption context, I will apply the remaining law to West Virginia's statute. This analysis is complicated, however, by the fact that the United States Supreme Court, in its *Stanley* line of cases at least, tended to determine the constitutionality of the statute based upon the facts presented by the father involved. For example, although the father in *Quilloin* was not found to have his constitutional rights affronted by the consent provisions of the Georgia statute, it is likely that had the challenge been brought by a father like the father in *Caban*, the result would have been different. When considering the constitutionality of our statute, therefore, under the *Stanley* line of cases, the answer is the favorite of most law professors: it depends. It depends upon the challenger.

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<sup>201</sup> See *Cochran v. U.S. Credit Life Insurance Co.*, 494 S.E.2d 927, 928 (W. Va. 1997) (noting that everything beyond syllabus point in a per curiam opinion is dicta; the syllabus point remains precedent).

<sup>202</sup> *Id.* at Syl. pt. 4.



Therefore, if one really wants to test the constitutionality of our statute under all circumstances, again in the tradition of all law professors, perhaps a few hypotheticals with strong facts would be useful. For this enterprise, I will create two hypotheticals: one dealing with an older child and the other, a newborn. These two factual situations are both common and qualitatively different in terms of the analysis they evoke. I will consider each one fully and separately.

#### 1. Hypothetical 1: The Older Child with Ties

*Let's assume the child to be adopted, Sam, is five years old. His biological mother, Rita, never married his biological father, Joe, but Joe and Rita lived together for two years before Sam was born and continued to live together with Sam for three years thereafter. Joe is on the birth certificate as Sam's father, and Joe believes erroneously that this suffices to establish himself as Sam's father. The couple separates and Joe continues to visit with Sam two weekends per month and, even though no support has ever been ordered because paternity has never been established, he does contribute irregular amounts of support depending upon what he feels he can afford. He also buys Sam presents at Christmas and on his birthdays.*

*Rita marries Tom a year after she and Joe separate, and Joe continues to visit with Sam. However, Rita and Tom want to establish themselves as Sam's nuclear family, and so they file an adoption petition. Joe is not approached for consent because he does not meet the definition of a determined father.*

*Joe receives notice because he lived with Sam for the first three years of his life. Joe asks, but Rita will not sign the paternity affidavit. Joe files a paternity action, which is referred to the family law master. Because Sam has lived with Tom and Rita for over a year, Rita and Tom ask to have the final adoption hearing set immediately after the forty-five days from the filing of their petition expires. Joe cannot have his paternity action adjudicated in that forty-five day period. Joe objects to the adoption and challenges the constitutionality of the consent provisions.*

It is probably not necessary to apply the stringent standards of *Miller* to this case to find West Virginia's statute unconstitutional as applied to Joe. Even under the *Stanley* line of cases, this difference in treatment of non-marital fathers and mothers probably cannot be upheld under these facts. Joe here is far more like the father in *Caban*, than the one in *Quilloin*. Like the father in *Caban*, he lived with the mother and his child for an extended period of time; he visited even after the separation; and he helped to support his child financially.<sup>203</sup> Given these facts as they existed in *Caban*, the Court was unwilling to uphold the differences in treatment based upon gender.

The only hope for this statute under the *Stanley* line of cases is to argue that this case is more like *Lehr* than it is *Caban*. The state here could argue that, unlike New York's statute in *Caban*, West Virginia's consent provisions do not

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*See Caban*, 441 U.S. at 382.

exclude all non-marital fathers from providing consent and that, like the notice provisions upheld in *Lehr*, the State did provide Joe with a mechanism to put himself in the category of those who must be approached for consent. If only Joe had approached Rita to sign the affidavit of paternity with him earlier when times were good between them, he wouldn't be excluded now. If only Joe had filed a paternity action earlier and had been adjudicated the father, he would not be excluded now. These arguments prevailed in *Lehr* due to the existence of the state's putative father registry which gave the non-marital father a quick and simple method totally within his control to opt in to the category of fathers entitled to notice.

Of course, the West Virginia Supreme Court of Appeals could accept this argument on behalf of the state. However, there are two factors that make the state's argument less likely to succeed here. First, the facts here are stronger on Joe's behalf than they were for the father in *Lehr* who had never supported and rarely seen his child, and Justice Stevens framed the question with these facts beginning with the first sentence of his opinion in *Lehr*.<sup>204</sup> Second, the West Virginia Supreme Court of Appeals has taken a much less mechanistic approach to parental relationships than the United States Supreme Court did in *Lehr*.

The West Virginia Supreme Court of Appeals approach can be seen in *Roy Allen S.* where it rejected the United States Supreme Court's holding in *Michael H.* for purposes of its analysis under the West Virginia Constitution:

[T]he liberty interests of fathers of illegitimate children were not premised.... on the maintenance of rights within the traditional family unit. Rather they focus on the personal stakes of fathers in their relationships with their children, regardless of whether the setting is traditional. . . . In our opinion, the strength of a parent's bond with his or her child is not dependent upon some official or traditional arrangement; rather, the strength derives from the parent's personal and emotional investment and the relationship that develops from that investment. The "liberty" of the Due Process Clause is grounded in protecting those concerns, such as parenting, that are vital to an individual's self-fulfillment and not in preserving formalities.<sup>205</sup>

Whether the West Virginia Supreme Court of Appeals is applying federal or state constitutional law to this case, it is unlikely that it will preserve this statute on the argument that, despite having grasped the opportunity to develop a supportive relationship with Sam, Joe loses his right to consent because he did not formally establish paternity earlier.

This conclusion is bolstered by the West Virginia Supreme Court of Appeal's decision in *Kessel* in which it went beyond reiterating that a non-marital father who grasps his opportunity to act as a father has a constitutionally protected

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<sup>204</sup> See *id.* at 249-50.

<sup>205</sup> See *Roy Allen S.*, 424 S.E.2d at 562 (citations omitted).

interest,<sup>206</sup> but that both male and female unwed parents have equal rights to establish that relationship from the instant the child is born.<sup>207</sup>

Even if the outcome of such a challenge is not as certain as I have argued here, there are undoubtedly risks inherent in maintaining Section 301 of the current statute as it is. The statute's exclusion of non-marital fathers who have established meaningful relationships with their children on the basis of the kind of pinched formalism exhibited in *Lehr* is risky if left to be considered by the same Court that found thwarted fathers who had never established relationships with their children, such as the father in *Kessel*, are constitutionally protected.<sup>208</sup>

## 2. Hypothetical 2: The Newborn

*Let's assume that Caroline and Mark had dated for three years before Caroline became pregnant. They are both in their third year of college. When Caroline tells Mark about the pregnancy, he is excited and asks Caroline to marry him. Caroline, who has had doubts about her relationship with Mark and who does not feel prepared to raise a child, declines his proposal. She tells him of her desire to place the baby for adoption, and he opposes this option, saying that he will raise the child. Caroline feels strongly that a baby deserves to be raised in a two-parent household and doubts that Mark is ready to raise a child. The couple breaks up and Caroline leaves to live with a cousin in another county.*

*Mark does not know where Caroline is and his attempts to find her fail. He does not have the resources to hire a private detective, but he uses the internet in an effort to track her down with no success. He knows an approximate due date, but he does not know where the baby might be born. He files a paternity action in Caroline's home county on the baby's due date but cannot find Caroline to serve it upon her. Meanwhile, the baby was born two weeks early and placed for adoption with Caroline's consent before Mark's paternity action is even filed.*

*Caroline discloses Mark's identity to the adoptive parents who note him in the adoption petition as required.<sup>209</sup> The adoption petition is filed before Mark's paternity action. At the final hearing, the court determines that Mark need not provide his consent for the adoption to proceed, but that notice ought to be provided to him as a person whom the court in its discretion believes may have relevant information that the court wants to hear.<sup>210</sup> The final hearing is continued until Mark can be served. Mark receives notice, enters an appearance and contests the adoption. He also challenges the constitutionality of the consent provisions.*

*At the continued final hearing, the court hears Mark's evidence about his desire to parent the child and the efforts he made to establish his paternity, none of*

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<sup>206</sup> See *Kessel* 521 S.E.2d at 746-47.

<sup>207</sup> See *id.* at 756.

<sup>208</sup> See *id.* at 750.

<sup>209</sup> See W.VA. CODE § 48-22-502(g) (2001).

<sup>210</sup> See W. VA. CODE § 48-22-601(b)(3) (2001).

which have been adjudicated at that point. Mark also introduces evidence that he has purchased baby furniture, diapers, and clothes and is ready to assume responsibility for his daughter. He has even attended a parenting class offered by the local hospital.

The court also hears from the person appointed to perform the discreet inquiry<sup>211</sup> that the baby has thrived with her adoptive parents for the last six months, that she has bonded well with the family, and that the adoptive parents are financially and emotionally capable of caring for her. The court ultimately finds that the best interests of the child reside with the adoptive parents, grants the adoption and denies Mark's constitutional challenge. Mark petitions to the West Virginia Supreme Court of Appeals to take his appeal.

What will become of Mark's challenge if the West Virginia Supreme Court of Appeals decides to take it? A close look at *Kessel* reveals the high degree of judicial ambivalence around the strength of the non-marital father's liberty interest. Under *Kessel*, it is likely that the West Virginia Supreme Court of Appeals believes that Mark, who acted in many ways like the father in *Kessel*, has a "constitutionally protected right to establish and maintain a parent-child relationship with his [child] despite his inability to have his physical custody or to visit with him prior to his pre-adoptive placement."<sup>212</sup>

However, as explained earlier in this article, footnote 31 to this very statement seems to belie the significance of that constitutionally protected right in this case. In Mark's hypothetical case, if the Court were to take seriously the qualifiers of footnote 31, it might uphold the result in this case because the circuit court did consider the child's best interests after hearing the report of someone acting in a position similar to that of a guardian ad litem.

However, footnote 31 also exists side-by-side with the Court's later holding in *Kessel* that both unwed parents have equal rights at the instant of the child's birth.<sup>213</sup> Under this holding, in order to preserve his parental interest in his newborn child, Mark would have had to demonstrate his commitment to assume the responsibilities of parenthood immediately upon learning of the birth of his child.<sup>214</sup> Has Mark met this test by filing his paternity action by readying himself to assume custody and by stepping forward in the adoption proceeding? These are questions as yet unresolved by the West Virginia Supreme Court of Appeals.

Let's assume for the purpose of argument that the West Virginia Supreme Court of Appeals does uphold the statute and the circuit court's result in this hypothetical case. Let's assume further that Mark petitions for certiorari to the United States Supreme Court on the constitutionality of our consent statute as it applies to him. If the Supreme Court accepts his case, how will it view West Virginia's notice and consent provisions?

This is the case that the United States Supreme Court has dodged and

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<sup>211</sup> See W. VA. CODE § 48-22-701(b) (2001).

<sup>212</sup> See *Kessel*, 511 S.E.2d at 750.

<sup>213</sup> See *id.* at 756.

<sup>214</sup> See *id.*

excepted in its *Stanley* line of cases.<sup>215</sup> If we rely upon the *Stanley* line of cases, we might be able to imply some sympathy for the State's interest in permanency in placements of infants for adoption. However, it is also true that the language in the Court's opinions here rely upon the justification for differential treatment of non-marital fathers and mothers on just the type of sexual stereotyping that the majority of the current United States Supreme Court has rejected in *Miller*. Justice Steven's philosophy that men and women are different when it comes to pregnancy and childbirth does not carry much weight with a majority of the current Court.

Nevertheless, our statute does not treat all non-marital fathers differently from non-marital mothers, only those who fall outside of the determined father category. If we consider how one becomes a determined father, it is clear that Mark is not one. He was unable to have Caroline sign the affidavit acknowledging his paternity. He attempted to file a paternity action, but the timing is off for it to have been pending at the time of the filing of the adoption petition and it has not been adjudicated prior to the final hearing because he was unable to find and serve Caroline. It is possible that if the circuit court judge in this hypothetical had not exercised his discretion to provide Mark with notice, he may never have even had the opportunity to contribute evidence on the best interest question.

What is the state's interest in giving only determined fathers the right to consent? And is this interest sufficient justification for the differential treatment of non-marital mothers and fathers? One likely state interest at work here is the swift and permanent placement of infants for adoption. Determined fathers, like birth mothers, are identifiable and, therefore, the state's decision to allow them consent power and to exclude others who may be hard to identify and even harder to locate meets that theoretically valid state interest. The facts here, however, belie this justification. It was the biological mother who the father could not locate; the mother knew where to find the father. And without evidence to support a generalization that non-marital fathers disappear, isn't a statute based on this justification exactly the type of sexual stereotyping which the majority of the Court rejected in *Miller*?

Another possible state interest is that the determined father category separates the committed father from the uncommitted father because the committed father would discover what the law is and take timely action to preserve his rights. The argument would cite to *Lehr* for support of the proposition that as long as the state provides the father with a way of opting into the committed father category, the state has given the non-marital father sufficient opportunity to protect his interests. However, did Mark have any real opportunity here that was completely within his control? Caroline controls whether she will sign the affidavit of paternity. Mark tried his best to file a paternity action, but its timing and progress was thwarted by the baby's early birth and Caroline's disappearance. Is Mark to be faulted for not staying with Caroline to follow her movements when she did not want to have a relationship with him any longer? Is this statute really meant to encourage the stalking of pregnant women?

The use of determined father status as a proxy for committed fatherhood is

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See *supra* Part II.A.

also belied by the actual facts surrounding paternity establishment not only in West Virginia, but throughout the country. The fact is that paternity actions brought by fathers who want to claim their children are so rare that the West Virginia Supreme Court of Appeals has referred to them as "inverse paternity actions."<sup>216</sup> Indeed, many paternity actions are brought not by the father or mother of the child, but by the state itself as it seeks to establish paternity for child support purposes.<sup>217</sup> Similarly, although the payment of child support may indicate the degree of commitment that the father has to the parent-child relationship, it is also possible that it reflects just as much the efficiency of the local child support enforcement unit's use of the many automatic collection devices it has in place, such as wage assignments and tax intercepts.<sup>218</sup> Therefore, the determined father category is both over-inclusive and under-inclusive in its attempt to separate the committed fathers from the non-committed fathers.

Other states that have considered the constitutionality of their statutes as applied to newborn infant adoptions have interpreted *Lehr* to require the state to provide some meaningful way that the non-marital father can act on his own to preserve his interest in his newborn child.<sup>219</sup> It is questionable whether our statute provides this opportunity to non-marital fathers in the infant adoption context. Certainly, Mark was not afforded this opportunity. Only the non-marital father who knows precisely when his child is born and files a paternity action before the

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<sup>216</sup> In *Kessel*, the Court referred to the non-marital father's paternity action as an "inverse paternity action" and explained in a footnote:

The atypical phrase "inverse paternity action" refers to a paternity proceeding initiated by a putative father to determine whether he is, in fact, the biological father of a non-marital child. In such a proceeding, the biological mother of the child is generally named as a defendant to the action...The unusual arrangement of the parties to an inverse paternity action is in contrast to the more common scenario in which a biological mother, a non-marital child, or the representative of a state agency initiates a proceeding against a biological putative father, thereby naming him as a defendant to the action.

511 S.E.2d at 735.

<sup>217</sup> The state has standing to bring a paternity action. See W. Va. Code § 48-24-101(e)(3) (2001). In West Virginia, in 1998, 5,577 of the 9,382 paternities established by the Office of Child Support Enforcement were the result of actions brought by the state. West Virginia Office of Child Support Enforcement (data on file with the author). Nationally, in 1998, states established paternity in 844,881 cases by adjudication. Dep't. of Health and Human Service, Office of Child Support Enforcement, FY 1998 Preliminary Report Data 11 (May 1999) (unpublished data on file with the author).

<sup>218</sup> Wage withholding is required and may be accomplished through West Virginia Code section 48-14-401(a) (2001). Tax intercepts occur under the authority of federal statute. 42 U.S.C. § 664 (1994). In West Virginia, in 1996, the Office of Child Support Enforcement collected \$7,862,705.00 via federal tax intercepts. See Office of Child Support Enforcement, *Table 66: Federal Income Tax Refund Offset for Five Consecutive Fiscal Years* (site visited June 13, 2000) <<http://www.acf.dhhs.gov/programs/cse/rpt/21/st66.pdf>>.

<sup>219</sup> See *Raquel Marie X.*, 559 N.E.2d 418, 419 (N.Y.), *cert. denied*, 498 U.S. 984 (1990) (holding unconstitutional the requirement that the unwed father must have lived openly with the mother for six months prior to the child's placement in order to earn veto power over the adoption); *Adoption of Kelsey S.*, 823 P.2d 1216, 1236-37 (Cal. 1992) (holding that statute creating category of "presumed father" whose consent was required prior to adoption violates federal constitutional guarantees of equal protection and due process for unwed fathers to the extent that the statutes allow a mother unilaterally to preclude her child's biological father from becoming presumed father).

adoption petition can truly achieve consent status. As explained earlier in this article, this may mean that the father has to file his paternity action within three days of the child's birth.

If we vary the facts so that Mark knew when his child was born but failed to file his paternity action until a week after the child was born and after the adoption petition had been filed, the question then would become: Does this three-day window provide non-marital fathers with an opportunity to preserve their rights?

Here the Court might engage in a comparison of *Lehr*'s putative father registry with the provisions in the West Virginia statute. The Court could find significant differences. The simplicity of the putative father registry was touted by the Court. All it took was the mailing of a simple post card.<sup>220</sup> The filing of a paternity action, on the other hand, requires some legal knowledge or representation by counsel. The putative father registry did not have tight time limits. After having sex, a father could simply mail in his card and put the state on notice of his interest in any child born during the relevant time.<sup>221</sup> The paternity action here had to be filed within three days of the child's birth in order to absolutely secure his right to be approached for consent. The putative father registry was a central registry within the state and did not require the father to know where the child was born.<sup>222</sup> Under the West Virginia paternity statute, the father has to wait for the child to be born so he knows in which county to file the action.

Finally, the Court in *Lehr* also commented about the inclusiveness of New York's notice provisions by stating: "If this scheme were likely to omit many responsible fathers, and if qualification for notice were beyond the control of an interested putative father, it might be thought procedurally inadequate."<sup>223</sup> West Virginia's statute is not nearly so inclusive as the New York statute which covered not only those fathers who filed with putative father registry, but also six other categories of fathers.<sup>224</sup>

Therefore, even in a case with better facts for the state than those in this hypothetical, the United States Supreme Court might have difficulty finding that the state's interests justified the creation of such a narrow category of non-marital fathers while granting all non-marital mothers the right to consent. Indeed, the current Court could move away from *Lehr* and find that sexual stereotypes underlie the state's felt need to determine who the committed non-marital fathers are while granting all non-marital mothers the right to consent without such a test. If so, expect a vigorous Stevens and Rehnquist dissent.

Of course, the great tragedy in such a ruling would be that the child at issue likely would have lived with her adoptive parents for at least a couple of years

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<sup>220</sup> See *Lehr*, 463 U.S. at 264.

<sup>221</sup> See *id.* at n. 4. (quoting the New York statute which established the registry to allow filing by any putative father "before or after the birth of a child out of wedlock").

<sup>222</sup> See *id.*

<sup>223</sup> *Id.* at 263-264.

<sup>224</sup> See *id.*

by the time a decision came down finding that her adoption was flawed by an unconstitutional statute.

### 3. Some Final Thoughts on the Constitutionality Gambit

It is true that in the above two hypotheticals I have stacked the deck with facts favoring non-marital fathers. However, these facts are not so rare that they haven't been mirrored in other cases. For example, hypothetical number two contains many of the facts found in *Kessel*. Hypothetical number one contains many of the salient facts of *Caban*. In constructing these hypotheticals as I have, I have attempted to put our statute to the toughest tests in order to discover whether it will be found constitutional in its treatment of non-marital fathers. Although no one can predict such outcomes with absolute certainty given the degree of ambivalence in both the state and federal judiciary, it is clear that the statute is vulnerable to attack if the facts are right.

The legislature could rely upon the recent decision in *Kessel* to scare lawyers of all stripes into approaching all fathers for consent and notice. After all, who wants to be hit with an eight million dollar jury verdict for following the letter of the law in West Virginia, especially given the confusion around the meaning of section 501? However, wouldn't it make sense to bring the statute in line with what the Supreme Court of Appeals has decided in *Kessel* rather than having lawyers and judges throughout the state rewriting the statute on a case-by-case basis because they are afraid of the statute as it is?

The legislature could gamble that either no non-marital fathers will come forward to challenge the statute or that, if they do, their facts will be bad and the statute will be upheld. However, even if the legislature wants to maintain the current consent and notice sections, section 501 still should be amended to reflect that intent. The statute as it stands now is confusing and contradictory.

## IV. MAKE ROOM FOR DADDY: EXPLORING SOLUTIONS

### A. *Providing Notice and Consent to All Biological Parents: Amending Sections 301 and 601 to Conform with Section 501*

How should the West Virginia statute be amended to ensure its constitutionality against the most vigorous attacks? Clearly, amending the current consent and notice provisions to be consistent with section 501 would secure that goal.<sup>225</sup> For statutes that give putative fathers without regard to their legal status the

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For articles that argue that unwed fathers and mothers should be treated identically in adoption, see Toni L. Craig, *Establishing the Biological Rights Doctrine to Protect Unwed Fathers in Contested Adoptions*, 25 FLA. STATE U. L. REV. 391 (1998) (arguing that an unwed father's efforts to assume parental responsibility by asserting his rights in the adoption proceeding should negate any interests the prospective adoptive parents may have, and his fitness should be rebutted only by clear and convincing evidence that obtaining custody of the child would result in serious detriment); Daniel C. Zinman, Note, *Father Knows Best: The Unwed Father's Right to Raise His Infant Surrendered for Adoption*, 60 FORDHAM L. REV. 971 (1992) (arguing that non-marital fathers' rights would be better protected by expedited adjudication of his rights and temporary custody to him pending such adjudication); Claudia Serviss, Comment, *Lehr v.*



right to withhold consent clearly treat all biological fathers the same as all biological mothers and are therefore, above reproach.

Given the legislature's earlier reluctance to place non-marital fathers on the same footing with marital fathers and biological mothers, are there other ways that the legislature could amend this statute that would not be so extreme? Again, the answer to this question may be no, if the *Miller* case is read to subject the differential treatment of non-marital fathers and mothers in the adoption context to the heightened scrutiny of the current majority.<sup>226</sup> After all, the state's decision to require non-marital fathers to prove their commitment to their children while not requiring the same of non-marital mothers arguably is based on the gender stereotype that non-marital fathers are not as interested in or committed to the welfare of their children as non-marital mothers are.<sup>227</sup> To say that some non-marital fathers maintain relationships of varying degrees with their children is not to say that their parenting responsibility is in any way operating at the same level as mothers. Fathers generally, whether married or not, perform less direct parenting than do mothers,<sup>228</sup> despite the fact that there has been an increase in recent years of what some have called "the nurturing father."<sup>229</sup> These gender differences in the level of direct parenting remain true in intact families where both parents work outside the home.<sup>230</sup> The average American father spends an average estimated twelve minutes per day in solo childcare. Another study reported that mothers spend about three times as much time with their children in face-to-face interaction

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Robertson's "Grasp the Opportunity": For California's Natural Fathers, Custody May Be Beyond Their Grasp, 18 W. ST. U. L. REV. 771 (1991) (arguing that only unfitness should deprive fathers of custody); Rebecca L. Steward, Note, *Constitutional Rights of Unwed Fathers: Is Equal Protection Equal for Unwed Fathers?*, 19 SW. U. L. REV. 1087 (1990) (arguing that the heightened scrutiny of gender-based distinctions should apply to rules governing non-marital fathers); Jennifer J. Raab, Case Comment, *Lehr v. Robertson: Unwed Fathers and Adoption—How Much Process is Due?*, 7 HARV. WOMEN'S L. J. 265 (1984) (arguing that notice and an opportunity to be heard should be given to all non-marital fathers). See also WYO. ST. ANN. § 1-22-109 (a)(iii) (1999).

<sup>226</sup> See *In re Kelsey S.*, 823 P.2d 1216 (Cal. 1992) (holding that a statute similar to West Virginia's, in which determined fathers and non-marital mothers were given greater rights than those given to other biological non-marital fathers, was a sex-based distinction that bore no relationship to any legitimate state interest once the child was born).

<sup>227</sup> It cannot be said that *all* non-marital fathers are absent fathers. A longitudinal study based upon data gleaned from the National Survey of Labor Market Behavior examined a cohort of young men, 600 of whom were unwed fathers, from 1979 through 1988 to compare the family patterns of unwed, married, and divorced or separated fathers. The study found that in 1984 nearly 20% of unmarried young fathers reported living with all of their children. Of those unwed fathers who did not live with their children in 1985, nearly half reported visiting with their youngest child at least once per week and almost 25% said they visited every day. Robert I. Lerman, *A National Profile of Young Unwed Fathers* in YOUNG UNWED FATHERS: CHANGING ROLES AND EMERGING POLICIES 31, 45 (Robert I. Lerman and Theodora J. Ooms eds. 1993).

<sup>228</sup> See Nancy E. Dowd, *Rethinking Fatherhood*, 48 FLA. L. REV. 523, 524-25 (1996).

<sup>229</sup> KATHLEEN GERSON, NO MAN'S LAND: MEN'S CHANGING COMMITMENTS TO FAMILY AND WORK 8 (1993).

<sup>230</sup> For a review of the survey literature on the "leisure gap" experienced by working wives in comparison to their husbands caused by heavier housework and child care burdens assumed by wives, as well as her own conclusions, see ARLIE HOSCHILD, THE SECOND SHIFT 79, app. 286-93 (1989).

than fathers.<sup>231</sup> Never-married mothers are the group of women most likely to be at home with their children.<sup>232</sup>

Or perhaps the disparate treatment of non-marital fathers and mothers is based on the generalization that mothers are known and can be found while fathers are not so easily determined or located. However, in *Miller*, the majority seemed to reject just such arguments when considering why the children of non-marital fathers, but not mothers, would have to take extra measures in a more timely fashion to establish just who their biological parents were for naturalization purposes.

There are other good reasons to include all biological parents in both the notice and consent provisions of the statute. If *Miller* is not predictive of the United States Supreme Court's current stance on this issue, one is left with the "substantial relationship test" of the *Stanley-Lehr* line of cases. Developing criteria that sift those who have a substantial relationship with their children from those who do not can be a sticky and, as the cases have indicated, fact-intensive business.<sup>233</sup>

One is also left to decide who will determine which fathers have developed a substantial relationship with their children? Will it be the adoptive parents and their attorneys as they decide who should be approached for consent? Will it be the biological mother who may know best the facts but may not, in every case, wish to divulge them? Will it be the court, thereby creating the need for yet another hearing in the adoption proceeding? In non-step-parent adoptions, the placement of a child with parents who were formerly strangers to her creates the need for transition and, if the adoption is to be finalized, hopefully bonding. What will the child be doing as the court struggles with the issue of whether a father is entitled to veto power over her placement?<sup>234</sup>

Finally, the substantial relationship test simply does not cover the newborn adoption situation. It has arisen in step-parent adoption cases and appears appropriate for such cases, but to apply such a test to newborns who will likely be placed in their adoptive homes three days after birth stretches the test beyond its feasible limits. One can look to pre-birth conduct and this option will be considered at greater length below, but the fact remains that much of what we consider

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<sup>231</sup> See JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 3 (2000).

<sup>232</sup> *Id.* at 2.

<sup>233</sup> For an article advocating that criteria to establish the "substantial relationship" test should be determined despite the difficulty of doing so, see Mary Shanley, *Unwed Fathers' Rights, Adoption, and Sex Equality: Gender Neutrality and the Perpetuation of Patriarchy*, 95 COLUM. L. REV. 60, 79 (1995). For an article exploring the way that the substantial relationship test has been applied in certain state court decisions to continue sending the message that the only way for a father to have a protected relationship with his child is through his relationship to the child's mother, see Deborah L. Forman, *Unwed Fathers and Adoption: A Theoretical Analysis in Context*, 72 TEX. L. REV. 967 (1994).

<sup>234</sup> For an opinion recognizing the connection between certainty, lack of delay and the child's best interest in adoption, see *Infant Child J. v. New Hope Child & Family Agency*, 994 P.2d 779 (Wash. Ct. App. 2000) (holding that trial court did not have the authority, following a hearing on the adoption petition, to continue the proceeding for 14 months while the prospective adoptive parents completed counseling on domestic violence because a delay in an adoption proceeding is contrary to the best interest of the child involved).

relevant pre-birth conduct requires the cooperation of the mother.<sup>235</sup> Under *Lehr*, particularly as it has been interpreted by other states,<sup>236</sup> the father must have a way to independently assert his interest in his child without the cooperation of the mother, although I submit that certainly destructive conduct should disqualify a father from the category of committed fathers, including abuse of the pregnant mother who carries his child.<sup>237</sup> the development of criteria based on pre-birth conduct must be very cautiously approached.<sup>238</sup>

Furthermore, if the general assumptions about non-marital fathers being uninterested in their children are correct, then inclusion of them for both notice and consent should pose no serious additional problems. The statute already has provisions for the termination of parental rights based upon abandonment.<sup>239</sup> The statute also provides for conduct that will presumptively constitute abandonment. This conduct is divided into two sections, one for children under six months of age and another for children over six months of age.<sup>240</sup> The provision for children under six months includes pre-birth conduct such as the failure to defray the costs of prenatal care within the father's means and the father's denunciation of paternity. These are joined with the conjunctive "and" together with other facts such as the failure to visit and provide financial support.<sup>241</sup> Even though some of this conduct

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For articles arguing that pre-birth conduct should be considered in determining the rights of non-marital fathers in adoption, see June Carbone, *The Missing Piece of the Custody Puzzle: Creating a New Model of Parental Partnership*, SANTA CLARA L. REV. 1091 (1999) (arguing that looking to pre-birth conduct fosters a much neglected aspect of the need for parental partnership that benefits children); Mary Shanley, *Unwed Fathers' Rights, Adoption, and Sex Equality: Gender Neutrality and the Perpetuation of Patriarchy*, 95 COLUM. L. REV. 60, 77-78 (1995) (suggesting that in examining whether the non-marital father has acted to assume responsibility the court should consider his conduct during pregnancy); Karen Czapskiy, *Volunteers and Draftees: The Struggle for Parental Equality*, 38 U.C.L.A. L. REV. 1415 (1991) (arguing that inclusion of pre-birth conduct encourages support of the biological mother and cooperative parenting decisions).

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See Raquel Marie X., 559 N.E.2d at 860-63.

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Estimates of the number of pregnant women who suffer domestic violence in the United States vary. Among adult pregnant women, the estimates range from 3% to 11%, but for teenage mothers, the rate is as high as 38%. Domestic violence during pregnancy has negative effects on both the mother and her soon-to-be-child. Pregnant women who experience battering tend not to seek prenatal care and gain insufficient weight. They are more likely to have cervical, uterine and kidney infections and to experience bleeding during pregnancy. Violence is also linked with increased risk of miscarriage, premature labor, fetal distress, and low birth weight. The Johns Hopkins School of Public Health, Population Reports (visited June 8, 2000) <[http://www.jhucep.org/pr/11/11chap4\\_4.stm#top](http://www.jhucep.org/pr/11/11chap4_4.stm#top)>. See also Dorothy E. Roberts, *Motherhood and Crime*, 79 IOWA L. REV. 95, 115 & n. 107 (1993) (reviewing evidence that the onset of domestic violence in a relationship often occurs during pregnancy).

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For a decision finding that a father had abandoned his child by virtue of the violence he inflicted upon the child's mother, even though he had provided some financial support for the child, see *In re Adoption of Baby E.A.W.*, 658 So. 2d 961, 965-66 (Fla. 1995).

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The statute defines abandonment generally as "any conduct by the birth mother, legal father, determined father, outsider father, unknown father or putative father that demonstrates a settled purpose to forgo all duties and relinquish all parental claims to the child." W. VA. CODE § 48-4-1(a) (1999).

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See W. VA. CODE § 48-22-306 (2001).

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See W. VA. CODE § 48-22-306(b)(1)-(2) (2001).

may be affected by the mother's attitude toward the father, that difficulty is cured by the fact that the statute offers the father the opportunity to raise that defense.<sup>242</sup> I would suggest that the statute be amended to add another separate ground for abandonment in the infant category: the physical abuse of the mother during pregnancy. Certainly the father who fails to appear after receiving adequate notice of the adoption proceeding and of a hearing to terminate his parental rights is likely to meet the criteria established for presumptive abandonment.

#### B. *Broadening Notice Requirements*

A possible middle ground some might offer is to broaden the notice provisions of section 48-22-601 so that at least all putative fathers, without regard to their legal status, would receive notice of the adoption.<sup>243</sup> Although this alternative would allow more fathers to assert that their children's best interests would be served best not by the adoption, but by being placed in their custody, it does not really address the primary inequity that relegates them to second-class status *vis a vis* the mother who has the opportunity to withhold consent and stop the adoption. In essence, the notice requirement does little more than create a custody dispute between the prospective adoptive parents and the biological father. His superior status as parent is not fully recognized.

Nevertheless, broadening the notice requirement would at least insulate section 601, the notice provision, against attack and would help to protect against the inadvertent as well as intentional omission of fathers who, even under the current narrow statute, should be included in the adoption proceedings for purposes of consent.

#### C. *Creating Two Standards: One for the Old and One for the New*

Perhaps the reader remains unconvinced that a current court would require the equal treatment of non-marital fathers and mothers. Nevertheless, it is indisputable that West Virginia's current statute does not take into account the criteria that have been established by the courts for the constitutional treatment of non-marital fathers. How might one amend our current statute to be in conformity with both the *Stanley* line of cases and West Virginia's Constitution?

The difficulty is, of course, that the tests that have been developed by the courts appear inapplicable to many adoptions, particularly those involving newborns by adoptive parents unrelated to the child.

Perhaps we should stop straining to fit two distinct types of cases into one test. Perhaps the time has come to recognize that infant adoptions differ from the adoptions of older children and that is why the Supreme Court's "substantial relationship test" developed in the context of stepparent adoptions and included

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<sup>242</sup> See W. VA. CODE § 48-22-306(d) (2001).

<sup>243</sup> South Carolina requires that all fathers, without regard to whether they are entitled to provide their consent, receive notice of the adoption proceeding. See *South Carolina Dep't. of Social Services v. Doe*, 527 S.E.2d. 771, 773 (S.C. 2000).

language excepting infant adoptions from its holdings.

Such a division based upon age would not be unprecedented. Our statute already recognizes the need for different standards in the adjudication of abandonment based upon the child's age.<sup>244</sup> The Uniform Adoption Act also treats adoptions by stepparents separately from all other adoptions.<sup>245</sup> Of course, this approach would require a more radical restructuring of the current statute.

Under such an approach, those non-marital fathers of older children would be subject to the "substantial relationship" test in determining whether they must be approached for consent.<sup>246</sup> Those fathers of newborn children would need to be treated differently. Of course, this solution suffers from the disadvantages alluded to in the discussion in Part B. above. It is likely that more hearings would arise under a substantial relationship test and, therefore, the permanency of adoptions would be more unsettled for a longer period of time than under either the current statute or a statute which gives all non-marital fathers the right to consent and notice. However, like it or not, if one ignores *Miller*, the operative standard does appear to be the substantial relationship test.

### 1. Older Children and Criteria for the Substantial Relationship Test

For the fathers of older children, establishing criteria that would meet the substantial relationship test is somewhat easier than it is for younger children. After all, even if the mother has attempted to thwart the establishment of such a relationship, the committed father could have taken legal action to establish his rights via establishment of paternity and visitation. Therefore, the traditional criteria of actual physical custody, regular visitation and/or financial support within the father's means likely would meet what was in the contemplation of both the United States and West Virginia Supreme Courts.<sup>247</sup>

Of course, these general requirements would need to be made specific if we are to achieve the degree of certainty and predictability that is necessary in all matters dealing with the ultimate custody of children. How long and how recent should the non-marital father's physical custody be to suffice to establish a substantial relationship? How much visitation is "regular"? How much financial support is enough?

We can look to the abandonment statute to determine what is *not*

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<sup>244</sup> See *id.*

<sup>245</sup> See UNIFORM ADOPTION ACT §§ 4-101 - 4-113 (1994).

<sup>246</sup> By focusing upon the substantial relationship test as a criteria here, I am not necessarily excluding the use of the "determined father" criteria as well. Traditionally, fathers whose paternity has been established according to statute are considered to be vested with parental rights and are required to receive notice in cases involving the custody of their biological children. Nevertheless, I believe that it is not only more child-centered but also consistent with pre-*Miller* cases to limit these benefits only to nonmarital fathers who have lived up to their financial and emotional obligations to their children.

<sup>247</sup> For example, in New Jersey, the statute requires the court to look to "regular and expected parental functions" in determining the extent of a parent's right to participate in the adoption proceeding by examining the "core values of parenthood" which encompass maintenance of a parental relationship, communication between parent and child or financial support. See N.J. STAT. ANN. § 9:3-46 (1999). See also Adoption by G.P.B., 736 A.2d 1277 (N.J. STAT. ANN. § 9:3-46).

substantial. Under the provisions setting forth conduct that presumptively constitutes abandonment, the father who fails to visit or otherwise communicate with his child for an uninterrupted period of six months has presumptively abandoned his child.<sup>248</sup> But can it fairly be said that the parent who talks with his child only once during a six month period has maintained a "substantial relationship" with her? Instinct and common sense tell us that children need more consistent nurturing than that to feel the type of love and support expected from a parent. Although we don't want to treat non-marital fathers unfairly, we also need to hold them to the same standards we would hold mothers, and certainly society would expect more than this from a mother whose relationship we want to dub "substantial."<sup>249</sup>

Accordingly, it would seem appropriate that regular visitation involve time spent with a child on at least a monthly basis, if not weekly, basis<sup>250</sup> with perhaps one exception. It is not atypical in today's society that the relocation of parents causes visitation to be concentrated during summer months and holidays when school-age children's schedules are freer.<sup>251</sup> In West Virginia, until the recent custody reforms, it was typical that a family law master have a "Schedule A" visitation which presumptively met the needs of children whose parents lived close to one another, as well as a "Schedule B" visitation tailored to meet the needs of parents who live at some distance from one another. The reality of relocation continues to be recognized in the current statute that establishes a notice procedure and a series of presumptions for determining how custody will be allocated when a parent intends to move.<sup>252</sup> In such a circumstance, when children are separated from their parents by virtue of distance, such extended visitation times, if routinely exercised, should be sufficient to meet the "substantial relationship" test.

In order to be consistent with the abandonment statute, one might look at this history of visitation over the six months immediately preceding the filing of the

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<sup>248</sup> See W. VA. CODE § 48-22-306(a) (2001).

<sup>249</sup> For a discussion of the ways in which the *Lehr* standard actually expects less from fathers than it does mothers, see Karen Czapskiy, *supra* note 235, at 1418-23.

<sup>250</sup> An interesting measure developed in a slightly different context can be found in the American Law Institute's Commentary on its recently adopted standards for the allocation of custodial responsibility between parents. In discussing the amount of time that is sufficient to enable a parent to maintain a relationship with his or her child, the Institute commented:

Social scientists do not agree about the amount of time that is sufficient . . . . Based on now prevailing norms for "reasonable visitation," a presumptive period of four to six hours a week for children under the age of six months is a reasonable guide. For children over the age of six, six to eight days per month is reasonable.

PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION Part I, p. 123 (Tentative Draft No. 3, March 20, 1998).

<sup>251</sup> For example, "Almost two-fifths of divorced mothers move in the first year after divorce . . . . More of the moves reported by divorced women resulted from necessity than choice, especially in the immediate aftermath of divorce." FRANK F. FURSTENBERG & ANDREW J. CHERLIN, *DIVIDED FAMILIES: WHAT HAPPENS WHEN PARENTS PART* 54-55 (citing Sara McLanahan, *Family Structure and Stress: A Longitudinal Comparison of Two-Parent and Female-Headed Families*, 45 J. MARRIAGE & FAM. 347 (1983)).

<sup>252</sup> See W. VA. CODE § 48-9-403 (2001).

adoption petition. It is not enough that a parent have at one point visited regularly if it appears that his interest in his child has flagged or evaporated over time.<sup>253</sup>

If the non-marital father has had actual physical custody of the child at some point, whether by court order or simply through the parents' arrangements, this too should be considered in determining whether a substantial relationship has formed. Determining just how much physical custody and how recently is more difficult than determining what constitutes "regular visitation." After all, even though West Virginia has recently seen a legislative rebellion against cookie-cutter visitation schedules,<sup>254</sup> most practitioners, judges, and, indeed, lay people have expectations about what visitation will look like in most cases. However, the question of how much custody is enough custody is a less frequently decided question.

When determining whether a substantial relationship has formed, it seems appropriate to maintain a child's eye view of the situation.<sup>255</sup> Certainly a truly substantial relationship is a two-way street. From a child's perspective, time moves much more slowly than in it does for an adult. For example, for a child, summer vacation seems to stretch on endlessly until bliss turns into boredom. For the adult, summer flashes by in an instant filled with obligations and pleasures that we can barely accomplish or enjoy.<sup>256</sup> Similarly, a parent's absence is perhaps more deeply and quickly felt by the child who needs that parent to show him that he is valued and valuable. Therefore, simply saying that having had some physical custody of the child for some period in his life is not enough to say that the non-marital father has maintained a substantial relationship with his child.

Although there are certainly many lines that could be drawn, I would suggest considering any physical custody of the child in excess of one month in the last six prior to the filing of the adoption to be sufficient to establish in and of itself a substantial relationship with the child. Some may think this standard too generous while others may argue that in some cases it may be too harsh. However, again, it is meant to be consistent with the abandonment provision and to encourage sustained and minimally responsible relationships between parents and their children. If the

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<sup>253</sup> Indeed, it appears that the pattern for many non-custodial fathers is to become less faithful in visitation as the years move on. See Frank F. Furstenberg, Jr., and Kathleen Mullan Harris, *When and Why Fathers Matter: Impacts of Father Involvement on the Children of Adolescent Mothers in YOUNG UNWED FATHERS: CHANGING ROLES AND EMERGING POLICIES* 122 (Robert I. Lerman & Theodora J. Ooms eds. 1993).

<sup>254</sup> During the 1999 extended legislative session, the West Virginia legislature threw out the primary caretaker standard which had governed custody matters in West Virginia since *Garska v. McCoy*, 278 S.E.2d 357 (W. Va. 1981). The primary caretaker standard was replaced by West Virginia Code sections 48-9-101 to 48-9-604(2001), a new statutory scheme in which custody is allocated based upon both direct and indirect benefits provided by a parent to his or her child.

<sup>255</sup> For an example of one of the first scholarly works advocating the use of the child's perspective when deciding matters involving custody, see JOSEPH GOLDSTEIN, ET AL, *BEYOND THE BEST INTERESTS OF THE CHILD* (1973).

<sup>256</sup> I give credit for this example to Catherine Munster, a West Virginia attorney experienced in representing the interests of children in child abuse and neglect cases. She uses it frequently in training law students and attorneys to consider a child's sense of time when contemplating whether to object to the continuance filed by an opposing counsel.

father has continued visiting even after his custody terminated then he will be found to have maintained his substantial relationship under either the custody or regular visitation test.

Should the non-marital father be required to be both emotionally and financially supportive in order to be considered one entitled to consent? Our current abandonment statute requires a finding that the non-marital father has been irresponsible on both counts before he will be considered to have presumptively abandoned his child. One might argue, then, that following this lead that if the father has done one or the other— supported financially or emotionally— that this is enough to have established a substantial relationship with the child. However, children need both from their parents: they need physical *and* emotional sustenance. To degrade either by lifting one above the other would do damage both to a well-entrenched policy in favor of child support or to the real emotional needs of children. If financial support were all it took, then some benefactor, maybe even the state, might as well be the child's parent. If love were the only benefit bestowed by parents, then children likely would starve to death in infancy. I propose that in order to qualify as having maintained a substantial relationship with one's child, a parent must do both.

What then constitutes financial support within a parent's means? Some non-marital fathers will have a child support obligation established. Failure to meet that obligation consistently will certainly show that the father has not provided financial support within his means.<sup>257</sup> Child support obligations in West Virginia are calculated with both parents' incomes and obligations in mind.<sup>258</sup> If the obligor's income changes, it is his responsibility to petition to modify.<sup>259</sup>

What of those fathers who have not had their paternity established and hence have not had child support ordered? This is a more difficult question. Fathers in such situations often contribute financially by providing in-kind support, such as the purchase of clothing or diapers.<sup>260</sup> These contributions are often valued and should not be discounted. Establishing a clear frequency or amount of support in

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<sup>257</sup> How consistently must a father meet his obligation to pay child support in order to avoid a finding that he has in fact abandoned his child? This was the question the Kansas Court of Appeals recently faced. *See In re Adoption of R.W.B. & C.R.B.*, 7 P.3d 306 (Kan. Ct. App. 2000) (holding that a father who had met only 31% of his child support obligation had not met his obligation to the extent that consent to his children's adoption by their stepfather was required; specifically holding that "substantial support" as required by the statute requires that the parent pay at least 69% of court-ordered support).

<sup>258</sup> *See* W. VA. CODE § 48-13-103 (2001).

<sup>259</sup> *See* W.VA. CODE § 48-11-105 (2001). Under the reforms of the 1999 legislative session, an expedited modification process was put into place allowing either parent who experiences a substantial change of circumstance affecting his or her employment to file a verified statement of such change with supporting documents for a tentative recalculation of the support obligation which shall become final if no objection is made within 14 days of the opposing party's receipt of notice. W. VA. CODE § 48-11-106 (2001).

<sup>260</sup> *See* Maureen A. Pirog-Good, *In-Kind Contributions as Child Support: The Teen Alternative Parenting Program*, YOUNG UNWED FATHERS: CHANGING ROLES & EMERGING POLICIES 251-264 (Robert I. Lerman & Theodora J. Ooms, eds. 1993) (describing an Indianapolis-based project which encouraged the provision of in-kind support by way of services rendered to the mother as well as in the parenting and job development of the teenaged father himself in lieu of child support). For a narrative describing the provision of in-kind support such as clothing and diapers, see Lisa Kelly, *If Anybody Asks You Who I Am: An Outsider's View of the Duty to Establish Paternity*, 6 YALE J.L. & FEMINISM 297 (1994).



cases where there is no court order is almost impossible given the variable income levels of fathers and perhaps should not be attempted beyond the general statement of considering "support within his financial means."

This formulation of rights is a total departure from the current statute because who would be entitled to consent would not depend upon the legal formality of paternity establishment. Rather, consent would be dependent upon the father having come forward to establish himself as a father willing to assume financial and emotional responsibility for his children. It is entirely possible that a father may be legally determined as the father and yet not meet the substantial relationship test.

Of course, there will always be the non-marital father whose facts do not fit neatly into the criteria established and whose case we will view with some sympathy. For example, what of the father who has been suffering with an extended illness that has made regular visitation impossible? What of the father who has been thwarted by a mother who runs and hides and leave no trace, perhaps even stealing the child from a father who has had custody of the child? And how do we view fathers who have been incarcerated or committed to drug and alcohol treatment centers? This statute as proposed takes seriously the Courts' test for a substantial relationship. Fault or freedom from blame does not enter into it; the only relevant query is whether the father has established a substantial relationship with his child.

One way in which perhaps some of the harshness could be mitigated in these extraordinary cases is to amend the current statute to require notice to all biological parents. Providing notice would also ensure that fathers could present evidence that they met the criteria entitling them to consent, in case they have been wrongfully excluded from this category. If all fathers were provided the opportunity to present evidence on their particular facts then clear injustices might be avoided by determinations either that the parent-child relationships were substantial or that the adoption would not meet the child's best interests.

## 2. The Newborn Category

Within the newborn category, there are at least three possible solutions: 1) give all non-marital fathers of newborns rights equal to those of biological mothers; 2) set a time period to run from the non-marital father's receipt of notice during which he must come forward to demonstrate the requisite commitment in order to be approached for consent; or 3) develop criteria for a non-marital father's pre-birth conduct that would entitle him to consent.

### a. *Treating the Fathers and Mothers of Newborns the Same*

If one takes at face value the rejection by the *Miller* majority of basing differential treatment of non-marital fathers and mothers on the biological differences between men and women as they relate to childbearing, then it is difficult to imagine how one can configure a statute which treats mothers and fathers of newborns differently when it comes to consent and notice. If you take away the facts that Justice Stevens relies upon, i.e. that the mother has carried the

child for approximately nine months and has made constitutionally protected decisions to do so,<sup>261</sup> then the unwed father and mother appear, indeed, as Justice Davis in *Kessel* pointed out, to be on equal footing at the instant of birth.<sup>262</sup>

The difficulty of distinguishing between the two on the basis of post-birth conduct becomes particularly difficult under our statute where the father likely will have as little as three days before the child is placed to demonstrate "his commitment to assume the responsibilities of parenthood by coming forward to participate in the care, rearing, and support of his newborn child and by commencing to establish a meaningful parent-child relationship with his child."<sup>263</sup>

Given the difficulty of distinguishing between newborn mothers and fathers on criteria that the United States Supreme Court majority would not regard as stereotyping, one solution would be to treat newborn mothers and fathers identically, even if the non-marital fathers of older children would be held to the substantial relationship test.

Of course, providing notice and the right to consent to all nonmarital fathers does not foreclose the possibility of terminating his rights under the already existing abandonment provisions if his conduct meets those provisions.<sup>264</sup>

*b. Providing Notice to All Nonmarital Fathers in Order to  
Provide Them with an Opportunity to Qualify as  
Committed Fathers*

Still another approach might be to require that notice be provided to all non-marital fathers that a child has been born which will be or has been placed for adoption within a specified period unless he should come forward and establish himself as a father committed to raising the child. The court would set a hearing to be held a certain number of days after the non-marital father receives notice in order to determine whether the father has come forward and demonstrated commitment sufficient to entitle him to consent. Failure to appear would result in a finding of no entitlement.

This approach is not without its problems. The first of which is found in attempting to answer the question— where is the child to be while his father is noticed and deliberates whether to grasp the opportunity of fatherhood? The current seventy-two hour period is consciously chosen, in part, because this is the period that most hospitals will allow a healthy newborn to remain in their care. The prototypical infant adoption contemplates the adoptive parents taking the child home with them after the mother has signed her consent at the close of the seventy-two hour period. Under this scenario, the adoptive parents likely would still need to receive the child into their home with the understanding that the non-marital father might appear to express his interest in the child.

The second problem with this approach is that it actually may treat mothers

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<sup>261</sup> See *Caban* 441 U.S. at 404.

<sup>262</sup> See *Kessel*, 5111 S.E.2d at 756.

<sup>263</sup> *Id.*

<sup>264</sup> See W. VA. CODE § 48-22-306 (2001).

less favorably than fathers in that the mother makes an irrevocable decision without knowing whether the father will appear to upset her placement plans. However, there is a solution within the statute that ought to be more widely publicized and used should the legislature opt to amend the statute to allow non-marital fathers time to come forward. The adoption statute currently provides for conditional consents. Under these provisions, consent may provide for its own revocation if certain conditions are not met, one of which is the execution of a consent by another whose consent is required within a specified period.<sup>265</sup> Hopefully, more biological mothers would take advantage of this section if they are troubled by the possibility of the fathers of their children asserting themselves in the adoption proceedings.

In addition, perhaps the most difficult question raised by this option is how to establish criteria by which the non-marital father will establish himself as a committed father. On the one hand, arguments can be made that if the father has just learned of the existence of his child, that merely showing up and claiming his willingness to be the custodian of his child should qualify him because otherwise we are engaging in gender stereotyping by requiring him to prove himself worthy while we do not do the same for women. On the other hand, in circumstances where the father has known about the pregnancy and the child, there may be a relevant history of conduct to consider. If the conduct is negative, then perhaps the answer is to allow the abandonment section of the statute to take care of it, and if the conduct is positive, how is the child harmed by a statute that automatically favors his father's right to consent? However, the abandonment section should be amended to include physical abuse of the mother, given the extent, frequency, and damage caused by domestic violence during pregnancy.<sup>266</sup> I would suggest adding "physical abuse of the birth mother" as an alternative ground, separated from the others by the disjunctive "or."

Finally, the legislature would have to decide how long the noticed father would have to come forward and express his interest in fatherhood. Of course, the longer the period, the more unsettled the placement. One could look at the fact that the mother may have had only three days of motherhood to make her decision. However, this is not really accurate because she can withhold her consent for longer than three days if she wishes and, furthermore, she has at least known of the

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<sup>265</sup> See W. VA. CODE § 48-22-303(b)(1) (2001).

<sup>266</sup> The current statute governing conduct presumptively constituting abandonment for a child less than six months old provides:

(b) Abandonment of a child under the age of six months old shall be presumed when the birth father:

- (1) Denounces the child's paternity any time after conception;
  - (2) Fails to contribute within his means toward the expense of the prenatal and postnatal care of the mother and the postnatal care of the child;
  - (3) Fails to financially support the child within father's means; and
  - (4) Fails to visit the child when he knows where the child resides:
- Provided, That such denunciation and failure to act continue uninterrupted from the time that the birth father was told of the conception of the child until the petition for adoption was filed.

W. VA. CODE § 48-22-306(b) (2001).

impending birth of the child during her pregnancy. Establishing a fair amount of time ought to take into consideration both the father's need to deliberate and the child's need for prompt permanency.

Therefore, perhaps an amended abandonment provision together with an anticipated more frequent use of the conditional consent provision would satisfy most of the problems raised by this option. However, adoptive parents would have to sacrifice immediate certainty on the front end for the security that the hopefully successful adoption of their child will be immune from later constitutional attack.

*c. Pre-birth Conduct*

A final option would be to consider the use of pre-birth conduct as a means of qualifying non-marital fathers of newborns for the right to consent. As stated previously, the main consideration here is to make sure that the conduct chosen is not dependent upon the mother's assent. For example, it would not be appropriate or constitutional to condition the father's right to consent on whether he lived with the child's mother during her pregnancy.<sup>267</sup>

Again, the traditional idea of what it means to be a parent consists of one who provides both financial and emotional support. The rigors of parenthood, particularly of a newborn, require huge amounts of stamina. What types of positive pre-birth conduct evince the necessary commitment? Most statutes that interest themselves in pre-birth conduct do require the payment of pre- or post-natal birthing costs.<sup>268</sup> However, the actual payment of these costs may require the cooperation of the mother. Therefore, it would seem that a financial commitment that looks to whether the father, within his financial means, has put aside money for the raising of the child or whether he actually has purchased the furnishings necessary for the raising of an infant would be more appropriate and to the point. In addition, looking to whether the father has invested time and energy into resolving such dilemmas as childcare would also seem more tailored to ferreting out commitment to what might be single parenting than whether he has paid the mother's pre-natal medical bills. If the father is employed, has he thought about whether he can take leave from work as many mothers caring for a newborn would? If he is not employed, has he educated himself about the government programs available to ensure that his new family has at least subsistence levels of food, housing, and clothing? If he has no experience in taking care of a baby, how does he plan to educate himself on his child's needs?

In essence, the legislature should consider the types of pre-birth conduct that really do evince commitment to and preparation for parenthood, and these should be conduct that is independent of the mother's cooperation.

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*See* Raquel Marie X., 559 N.E.2d at 419 (holding unconstitutional the requirement that the unwed father must have lived openly with the mother for six months prior to the child's placement in order to earn veto power over the adoption); *Adoption of Kelsey S.*, 823 P.2d 1216, 1236-37 (Cal. 1992) (holding that statute creating category of "presumed father" whose consent was required prior to adoption violates federal constitutional guarantees of equal protection and due process for unwed fathers to the extent that the statutes allow a mother unilaterally to preclude her child's biological father from becoming presumed father).

<sup>268</sup>

*See Kessel*, 511 S.E.2d at 756 n.29.

### 3. The Dividing Line for Newborn vs. Older Child Adoptions

Another decision that would need to be made is the age at which a child moves from being a newborn infant to an older child with whom a non-marital father may have had the opportunity to establish a substantial relationship. The statute would need to define “newborn” or “infant” so that the court and parties know how to proceed.

To be consistent with both the abandonment statute and the treatment of non-marital fathers of older children proposed above, a sensible cut off would be six months. Any child who is under six months of age at the time that the adoption petition is filed should be considered an infant for these purposes.

One important consideration is whether this or any cut-off would influence the behavior of adoptive parents to the unfair disadvantage of the non-marital father. For example, would it benefit adoptive parents to wait until the child is six months and one day old to file the adoption petition so as to subject the non-marital father to a more stringent test before consent rights are granted? It may, particularly if all non-marital fathers of infants are granted the right to consent and the fathers of older children must meet “the substantial relationship” test. Such manipulation should not be permitted.

If the non-marital father’s right to participate via consent is in any way contested or subject to hearing, it is critical that these issues be resolved as promptly as possible. Disrupted adoptions, particularly infant adoptions where the adoptive family is the only family the child has ever known, are to be avoided at all cost. Since the necessary judicial determinations will not take place until after the adoption petition has been filed, it is critical, for the child’s well-being, that the adoption petition be filed as soon as the placement occurs. If the adoption is to be disrupted by a father claiming the right to withhold his consent, it is in everyone’s interest that it be disrupted immediately.

Requiring the adoption petition to be filed when the infant is placed will also avoid the manipulation of the system by adoptive parents who may seek to have the non-marital father subject to a standard he might not be able to meet while the child is in their custody. Therefore, the statute should also be amended to require that the adoption petition be filed at placement.

#### D. *The Putative Father Registry: Trying to Meet the Facts of Lehr*

Another possible solution to the non-marital father dilemma is to create a putative father registry, like the one upheld in *Lehr*. In the wake of *Lehr*, other states did just that.<sup>269</sup> The putative father registry has the advantage of being a simple vehicle through which the non-marital father independently can express his interest in any children he may have fathered.

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<sup>269</sup> See ALA. CODE § 26-10C-1 (1999); ARIZ. REV. STAT. § 8-106 (2000); ARK. CODE ANN. § 20-18-702 (1999); FLA. STAT. ANN. § 88.2011 (2000); GA. CODE ANN. § 19-11-9 (1999); 750 ILL. COMP. STAT. § 50/12.1 (2000); IND. CODE § 31-19-5-2 (2000); LA. REV. STAT. ANN. § 9:400 (2000); MO. REV. STAT. § 192.016 (2000); MONT. CODE ANN. § 42-2-202 (2000); N.M. STAT. ANN. § 32A-5-20 (1999); OHIO REV. CODE ANN. § 3107.06 (2000); TENN. CODE ANN. § 36-2-318 (1999); WYO. STAT. ANN. § 1-22-117 (1999).

Of course, the question still remains as to whether *Lehr* would have been decided the same way on different facts. If the father in *Lehr* had met the substantial relationship test as the Court enunciated in that opinion, it is doubtful that the putative father registry would have survived. Again, the "substantial relationship" test seems to be the overarching test.

In addition, the putative father registry would entail some administrative costs. Perhaps these costs could be offset by a minimal fee, but the fee would either need to be very small or waivable in some cases.<sup>270</sup> Nevertheless, there would be the costs of data collection and maintenance, printing and advertising. If the registry is to be anything more than a legal fiction, it cannot simply exist on the statute books. It would be important to publish its existence to the public. In short, the mere statutory creation of the putative father registry would not be enough. It would need to be funded.

#### *E. Giving Nonmarital Fathers More Time by Amending the Paternity Statute*

Another possible fix is leaving the adoption statute intact, with changes only to clarify the ambiguity in section 501, but amending the paternity statute to allow a father to bring a paternity action prior to the child's birth.

This option would, in essence, place the committed putative father in a position somewhat closer to that of the mother. Presumably both the mother and the father know that one of the consequences of sexual intercourse is pregnancy. However, beyond this fact, the mother is at a decided advantage in terms of information. As Justice Stevens pointed out, she alone may know she is pregnant; she alone may know where and when she has or will give birth. The father may or may not know these facts and it is certainly not impossible for her to conceal them from him if she is determined to do so.

Particularly in West Virginia, where the current statutory scheme may result in the father having only three days after the birth of the child to step forward and file his paternity action in order to secure his right to withhold consent, allowing fathers to file paternity actions before the child's birth has a certain appeal. The paternity statute would need to be amended carefully to re-think references to the word "child," and venue would also need to be reconsidered. Venue might need to be proper also in the county in which the child was conceived or in which the mother resides in order to allow the father to know where to bring his action.

This amendment *might* survive judicial scrutiny on a theory similar to *Lehr*'s approval of the putative father registry. The committed father, one who can be counted on to do what it takes for his child, to "step up to the plate," would find out about his need to file a paternity action and would do so. In effect, the paternity action would become an indicia of the level of the father's willingness to form a substantial relationship with his child through the legal system.

Problems with this fix do exist. Paternity actions cost money, not only for

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In Minnesota, the putative father registry is supported by charging an additional \$75.00 to the prospective adoptive parents at the time that they file their petition to adopt. See MINN STAT. § 259.52 Subdivision 14 (1999).

the litigants who are required to pay filing fees and the costs of service but also for the court system that must handle the ever-growing volume of paternity actions. Furthermore, is it realistic to assume or to expect that whenever a man engages in a procreative act he will rush on down to the local circuit court clerk's office for filing? Finally, the legislature must ask itself whether it feels that merely bringing a paternity action, whether either before or after a child is born, is a good proxy to determine a man's commitment to fatherhood.

This author has struggled with the wisdom of pre-birth paternity actions. On the one hand, a woman's right to choose whether to bear a child is her constitutionally protected right<sup>271</sup> and the idea of someone possibly establishing himself as the father of her non-existent child seems counterintuitive to the values that underlie that right.<sup>272</sup> Imagine if the woman denied that the man was the father of the unborn child. Would the court be empowered to order genetic testing to determine the man's relationship, if any, to the fetus? Measures would need to be taken to insure that such invasive steps into the woman's bodily integrity not be taken.

Although the thought of a man interjecting his rights into a woman's pregnancy has troubling undertones, there may be at least one advantage from the woman's point of view to allowing pre-birth paternity actions. For couples who are estranged, the filing of a paternity action early in the pregnancy may communicate to the pregnant woman important information that she needs to know as she deliberates over her pregnancy and childbirth options. For some women, the choice to place a child for adoption is one based upon the hope that the child will be raised in a financially and emotionally prepared two-parent family. The act of placing the child for adoption is a decision imbued with a particular vision of the child's future. If the mother knows that the father has expressed an interest in raising the child, this information may be critical to her decision regarding whether to continue with the pregnancy, whether to place the child for adoption, or whether to bear and attempt to raise the child herself.

In addition, the West Virginia Supreme Court of Appeals has made clear that by giving non-marital fathers of newborns parental rights equal to those of mothers, the Court in no way means to interfere with a woman's constitutionally protected right to choose whether to go forward with a pregnancy.<sup>273</sup> Also, the United States Supreme Court has been clear in its views on the unconstitutionality of conditioning the right to an abortion on the woman's husband's consent.<sup>274</sup> Certainly, men who are not even married to the pregnant women should be permitted to interfere even less in the reproductive decisions of women. If these constitutionally protected principles remain in focus, then allowing putative fathers to bring paternity actions before birth may have the benefits of informing the

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<sup>271</sup> *Roe v. Wade*, 410 U.S. 113, 153-57 (1973).

<sup>272</sup> *See Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 67-71 (1976) (holding that a state may not constitutionally require the consent of the spouse as a condition for abortion during the first twelve weeks of pregnancy).

<sup>273</sup> *See Kessel*, 511 S.E.2d at 756 n.35.

<sup>274</sup> *See Danforth*, 428 U.S. at 52.

woman, potential adoptive parents, and ultimately the circuit court who the parties in interest are should the child be placed for adoption.

Therefore, although allowing paternity actions to be filed pre-birth does not answer the difficult question of whether the Court would find the adoption statute constitutional in a case where the father has established a substantial relationship with his child even though he is not the legally determined father, it is a small step toward alleviating the harsh facts that may place fathers of newborns in a sometimes impossible position of asserting their rights to notice and consent.

## V. CONCLUSION

The need for change in the West Virginia adoption statute is clear. If for no other reason than to clarify existing ambiguities, it's time to take a second look at the manner in which non-marital fathers are treated. If the recent United States Supreme Court case of *Miller v. Albright* is to be taken seriously, it could spell the death of the longstanding practice of treating non-marital fathers differently than all other parents. Even if *Miller* does not apply in the manner I have suggested here, it is clear that there certainly would be some non-marital fathers who could successfully challenge the statute as it now exists, primarily those who have developed and maintained substantial relationships with their children.

In this article, I have attempted to provide a few solutions to the constitutional issues raised. These solutions range from equalizing the treatment of all non-marital fathers to the implementation of a "substantial relationship" test to the creation of a putative father registry or allowing pre-birth paternity actions. None of these solutions are problem-free, but each offers a statute that will be less vulnerable to attack by a non-marital father with good facts on his side.

It is certainly an option to do nothing and let the Court eventually tell us how to resolve the contradictions and the constitutionality questions inherent in the statute. However, if the facts of *Kessel* had played out here in West Virginia, instead of California and Canada, we might have had to look at a very different case. We might have been faced with a challenge to our statute that ultimately could have ended in the agony of a disrupted adoption. In order to avoid ever having to see that scene played out in any child's life, the West Virginia legislature should amend the current statute to give not only non-marital fathers, but all participants in the adoption process, the security of knowing that every adoption rests comfortably on constitutional ground.



